Exhibit #3.

Closing the Satellite Corporate Tax Loophole

CLOSING THE SATELLITE CORPORATE TAX LOOPHOLE

(Vermont 2013)

OVERVIEW

OVERVIEW
Closing the Satellite Corporate Tax Loophole

$5 to $7 Million lost annually.
Vermont is losing between $5 to $7 million dollars per year in tax revenues.

Tax parity is the goal.
Seeking to promote the goal of tax parity, this bill ensures that the overall level of taxation is equal among video providers, so that all multichannel video providers operate on a level playing field with respect to taxes, fees, and other charges assessed by Vermont and its municipalities.

Satellite Tax Parity Laws Upheld by the Courts.
Several Federal courts (including the 4th and 6th U.S. Courts of Appeal), the Massachusetts Superior Court and the Supreme Court of Ohio have already upheld these state tax parity laws against challenges brought by the satellite industry.

Unequal and unfair tax burdens.
Cable and satellite companies deliver essentially the same video services yet only cable television companies pay and collect franchise taxes, personal property taxes, real estate taxes, excise taxes, and regulatory fees.

Other states impose the satellite tax.
Other states equalize the tax burden and collect an addition 5% from satellite companies. They include Massachusetts, Virginia, Ohio, Florida, Kentucky, Utah, and North Carolina. Legislation is pending in other states.

Tax parity ensures fair competition and true consumer choice.
Competition and consumers are best served by ensuring tax neutral video competition rather than letting the disparate application of state and local tax laws determine winners and losers in the video and communications service marketplace. Tax policy and public policy argue that like services should be treated alike.

The tax loophole for large satellite companies is not fair.
DirecTV and Dish Network are the second and third largest video distributors in the United States with a total of over 31 million subscribers.

Cable employs hundreds in Vermont.
The cable television industry employs hundreds in Vermont, has call centers in Vermont and supports the municipalities. The satellite industry does none of this.

No SST Impact.
The draft legislation does not impact Vermont's compliance with the Streamline Sales and Use Tax Agreement.

Dated: January, 2013

LEGISLATION

AN ACT RELATING TO THE TAXATION OF SATELLITE TELEVISION PROGRAMMING.

It is hereby enacted by the General Assembly of the State of Vermont:

SECTION 1. 32 V.S.A. chapter 242 is added to read:

CHAPTER 242. TAX ON SATELLITE TELEVISION PROGRAMMING

Subchapter 1. General Provisions

32 V.S.A. § 10401. Definitions

Unless the context in which they occur requires otherwise, the following terms when used in this chapter mean:

(1) Commissioner: means the state tax commissioner in the department of taxes or any officer or employee of the department duly authorized by the commissioner (directly or indirectly by one or more redelegations of authority) to perform the functions herein mentioned or described.

(2) (a) As used in this chapter, "gross receipts" means all consideration of any kind or nature, including cash, credits, property, and in kind contributions received by any satellite programming distributor, or an affiliate of such person, except as otherwise provided in this section.

(b) For purposes of subsection (a), gross receipts includes the following fees and charges charged to subscribers for satellite programming:

(1) Recurring monthly charges for satellite programming.

(2) Event based charges for satellite programming, including pay per view and video on demand charges.

(3) Charges for the rental of equipment related to the provision of satellite programming.

(4) Service charges related to the provision of satellite programming, including activation, installation, repair, and maintenance charges.

(5) Administrative charges related to the provision of satellite programming, including service order and service termination charges.

(c) For purposes of subsection (a), gross receipts does not include the following received by a satellite programming distributor, or affiliate thereof:

(1) Receipts not actually received, regardless of whether it is billed, including

but not limited to, bad debts.

(2) Receipts received by an affiliate or any other person in exchange for supplying goods and services used by a satellite programming distributor.

(3) Refunds, rebates, or discounts made to subscribers, advertisers, or other person.

(4) Receipts from service other than satellite programming, including:

(A) telecommunications service as defined in 47 U.S.C. § 153(46);

(B) information service as defined in 47 U.S.C. § 153(20); or

(C) any other service not satellite programming.

(5) The tax imposed under subdivision 9771 (4) of title 32.

(6) Any tax of general applicability imposed on a satellite programming distributor, or a purchaser of satellite service, by a federal, state, or local governmental entity and required to be collected by a person and remitted to the taxing entity.

(7) Any foregone receipts from providing free or reduced cost satellite programming to any person, including employees of the satellite programming distributor or any governmental entity as required or permitted by federal, state, or local law, except receipts foregone in exchange for the goods or services through a trade or barter arrangement.

(8) Receipts from the sale of capital assets or surplus equipment not used by the purchaser to receive satellite programming from the satellite programming distributor.

(9) Reimbursements made by programmers to the satellite programming distributor for marketing costs incurred by the satellite programming distributor for the introduction of new programming that exceed the actual costs incurred by the satellite programming distributor.

(10) Late payment fees collected from subscribers.

(11) Charges, other than those charges described in subsection (b), that are aggregated or bundled with charges described in subsection (b) on a customer's bill, if the satellite programming distributor can reasonably identify the charges in its books and records kept in the regular course of business.

(3) Distributor: means any person engaged in the business of making satellite programming available for purchase by subscribers.

(4) Person: includes an individual, partnership, society, association, joint stock company, corporation, public corporation or public authority, estate, receiver, trustee, assignee, referee, and any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of the foregoing.

(5) Subscriber: means a person who purchases programming taxable under this chapter.

(6) Satellite programming: means radio and television audio and video programming services where the programming is distributed or broadcast by satellite directly to the subscriber's receiving equipment located at an end user subscriber's or an end user customer's premises. The term "satellite programming" includes but is not limited to:

a) the rental of receiving or recording equipment used by the subscriber or customer to obtain or use the service;

b) the provision of premium channels;

c) the installation or repair of receiving or recording equipment used by the subscriber or customer to obtain or use the service; and

d) the provision of music or other audio services or channels; and

e) any other service received in connection with the provision of satellite programming.

32 V.S.A.§ 10402. General powers of the commissioner

(a) In addition to other powers granted in this chapter, the commissioner may:

(1) Extend, for cause shown by general rule or individual authorization, the time of filing any return for a period not exceeding three months on such terms and conditions as the commissioner may require .

(2) Prescribe methods for determining the amount of gross receipts subject to tax.

(3) Require any person required to collect tax to keep detailed records of all receipts received, charged or accrued, including those claimed to be nontaxable, and of

other facts relevant in determining the amount of tax due and to furnish that information upon request to the commissioner.

(b) Any examination under oath conducted by the commissioner may, in his discretion, be reduced to writing and willful false testimony therein shall be deemed perjury and be punishable as such.

32 V.S.A. § 10403. Liability for tax

(a) Every distributor required to collect any tax imposed by this chapter or to pay it to the commissioner as required by this chapter shall be personally and individually liable for the amount of such tax together with such interest and penalty as has accrued under the provisions of section 3202 of this title; and if the distributor is a corporation or other entity, the personal liability shall extend and be applicable to any officer or agent of the corporation or entity who as an officer or agent of the same is under a duty to collect the tax and transmit it to the commissioner as required in this chapter.

(b) Any sum or sums collected in accordance with this chapter shall be deemed to be held by the distributor in trust for the state of Vermont. Such sums shall be recorded by such distributor in a ledger account so as to clearly indicate the amount of tax collected, and that the same are the property of the state of Vermont.

(c) Such distributor shall have the same rights in collecting the tax from the subscriber or regarding nonpayment of the tax by the subscriber as if the tax were a part of the amount due for the provision of satellite programming and payable at the same time; provided, however, if a distributor required to collect the tax has failed to remit any portion of the tax to the commissioner, that the commissioner shall be notified of any action or proceeding brought by such distributor to collect the tax and shall have the right to intervene in such action or proceeding.

(d) A distributor required to collect the tax may also refund or credit to the subscriber any tax erroneously, illegally, or unconstitutionally collected. No cause of action that may exist under state law shall accrue against the distributor for the tax collected unless the subscriber has provided written notice to a distributor, and the distributor has had 60 days to respond. Such notice must contain such information necessary to determine the validity of the request.

32 V.S.A. § 10404. Records to be kept

Every person required to collect any tax imposed by this chapter shall keep records of its gross receipts and of the tax payable thereon, in such form as the commissioner may by regulation require. The records shall be available for inspection and examination at any time upon demand by the commissioner or his or her duly authorized agent or employee and shall be preserved for a period of three years, except that the commissioner may consent to their destruction within that period or may require that they be kept longer.

Subchapter 2. Exemptions

32 V.S.A. § 10441. Transactions not covered

This chapter shall not cover the following transactions:

(a) Transactions that are not within the taxing power of this state under the Constitution of the United States.

(b) The provision of satellite programming to a person for resale in the ordinary course of business.

32 V.S.A. § 10442. Organizations not covered

The provision of satellite programming to or receipt of such programming by any of the following is not subject to the use taxes imposed under this chapter:

(a) The state of Vermont, or any of its agencies, instrumentalities, public authorities, public corporations (including a public corporation created pursuant to agreement or compact with another state) or political subdivisions.

(b) The United States of America, any of its agencies and instrumentalities, insofar as it is immune from taxation.

(c) An organization that qualifies for exempt status under the provisions of section 501(c)(3) of the United States Internal Revenue Code, if such organization has obtained a certificate from the commissioner stating that it is entitled to the exemption. The commissioner shall issue a certificate to any organization which has received federal certification of 501(c)(3) status.

32 V.S.A. § 10443. Certificate or affidavit of exemption

The commissioner may require that a distributor obtain an exemption certificate, which may be an electronic filing, with respect to sales for resale and transactions with organizations that are exempt under section 10342 of this title. Acceptance of an exemption certificate containing such information as the commissioner may prescribe shall satisfy the distributor's burden under subsection 10413(a) of this title of proving that the transaction is not taxable. A distributor's failure to possess an exemption certificate at the time when satellite programming is distributed to a customer shall be presumptive evidence that the provision of such programming is taxable.

Subchapter 3. Imposition, Rate and Payment of Tax

32 V.S.A. § 10471. Imposition of tax

Except as otherwise provided in this chapter, there is imposed a tax on the provision of satellite programming to a subscriber located in this state. The tax shall be paid by the distributor at the rate of five percent of all gross receipts derived by the distributor from the provision of satellite programming to the subscriber and shall be collected from the subscriber as provided in section 10375 of this title.

32 V.S.A. § 10472. Returns

(a)Except as otherwise provided in this section, every distributor subject to taxation under section 10371 of this title shall file a return with the commissioner stating the gross receipts derived by the distributor during each calendar quarter on or before the 25th day of the calendar month following such calendar quarter.

(b)The commissioner may permit or require returns to be made covering other periods and upon such dates as he or she may specify. In addition, the commissioner may require payments of tax liability at such intervals and based upon such classifications as he or she may designate. In prescribing the other periods to be covered by the return or intervals or classifications for payment of tax liability, the commissioner may take into account the dollar volume of tax involved as well as the need for insuring the prompt and orderly collection of the taxes imposed.

(c)The form of returns shall be prescribed by the commissioner and shall contain such information as he or she may deem necessary for the proper administration of this chapter. The commissioner may require returns and amended returns to be filed within twenty days after notice and to contain the information specified in the notice.

(d)Upon the failure of a taxpayer to file any return required under this chapter within 20 days of the date of a notice to the taxpayer under subsection (c) of this section, the commissioner may petition a judge of the superior court in the county wherein the taxpayer has a place of business (or, if the taxpayer has no place of business in this state, the commissioner may petition the Washington superior court), and upon the petition of the commissioner and a hearing, the judge shall issue a citation requiring the taxpayer (and, if the taxpayer is a corporation, any principal officer of such corporation) to file a proper return in accordance with this chapter, upon pain of contempt. The order of notice upon the petition shall be returnable not later than 20 days after the filing of the petition. The petition shall be heard and determined on the return day or on such day thereafter as the court shall fix, having regard to the speediest possible determination of the case consistent with the rights of the parties. The judgment shall include costs in favor of the prevailing party. The commissioner's authority to petition under this subsection is in addition to the commissioner's authority under section 10375(a) of this chapter to compute the tax liability of a taxpayer who fails to file a required return or files an incorrect or insufficient return.

32 V.S.A. § 10473. Payment of tax

Every person required to file a return under this chapter shall, at the time of filing the return, pay to the commissioner the taxes imposed by this chapter. The commissioner may require payment by electronic funds transfer from any taxpayer who is required by federal tax law to pay any federal tax in that manner, or from any taxpayer who has submitted to the tax department two or more protested or otherwise uncollectible checks with regard to any state tax payment in the prior two years. All the taxes for the period for which a return is required to be filed or for such lesser interval as shall have been designated by the commissioner, shall be due and payable to the commissioner on the date limited for the filing of the return for that period, or on the date limited for such lesser interval as the commissioner has designated, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of gross receipts or the taxes due thereon.

32 V.S.A. § 10474. Determination of tax or penalty

(a) If a return required by this chapter is not filed, or if a return when filed, is incorrect or insufficient, the amount of tax due shall be determined by the commissioner from any information available. Notice of the determination shall be given to the person liable for the collection and payment of the tax. The determination shall finally and irrevocably fix the tax within 60 days after giving notice of the determination unless the person against whom it is assessed shall apply in writing to the commissioner for a hearing, or unless the commissioner of his own motion shall redetermine the tax. After the hearing the commissioner shall give notice of his determination to the person against whom the tax is assessed.

(c) Notwithstanding subsection (a) of this section, the commissioner, if he or she believes the collection from a taxpayer of any deficiency, penalty or interest to be in jeopardy, may demand, in writing, that the taxpayer pay the deficiency, penalty or interest forthwith. The demand may be made concurrently with, or after, the notice of deficiency or the assessment of penalty or interest given to the taxpayer under subsection (a). The amount of deficiency, penalty or interest shall be collectible by the commissioner on the date of the demand, unless the taxpayer files with the commissioner a bond in an amount equal to the deficiency, penalty or interest sought to be collected as security for such amount as finally may be determined.

32 V.S.A. § 10475. Collection of tax from subscriber

Every distributor required to pay a tax under this chapter shall collect the tax from the subscriber when collecting the gross receipts to which the tax applies. If the purchaser is given any sales slip, invoice, receipt or other statement or memorandum of the amount paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him. The tax shall be paid to the person required to collect it as trustee for and on account of the state.

32 V.S.A. § 10476. Refunds

(a) As provided in this section the commissioner shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application to the commissioner for the refund shall be made within three years from the date the return was required to be filed. The application may be made by a subscriber who has actually paid the tax. The application may also be made by a person required to collect the tax, who has collected and paid over the tax to the commissioner, provided that the application is made within three years of the payment to him by the customer, but no actual refund of moneys shall be made to a person until he shall first establish to the satisfaction of the commissioner, under such regulations as he may prescribe, that he has repaid to the customer the amount for which the application for refund is made. The commissioner may, in lieu of any refund, allow credit on payments due from the applicant.

(b) A person shall not be entitled to a revision, refund or credit under this section of a tax, interest or penalty which had been determined to be due pursuant to the provisions of section 10305 of this title where he has had a hearing or an opportunity for a hearing as provided in that section or has failed to avail himself of the remedies therein provided. No refund or credit shall

be made of a tax, interest or penalty paid after a determination by the commissioner made under section 10305 unless it be found that the determination was erroneous, illegal or unconstitutional or otherwise improper, pursuant to law, in which event refund or credit shall be made of the tax, interest or penalty found to have been overpaid.

(c) If the commissioner determines on a petition for refund or otherwise, that a taxpayer has paid an amount of tax under this chapter which, as of the date of the determination, exceeds the amount of tax liability owing from the taxpayer to the state, with respect to the current and all preceding taxable periods, under any provision of this title, the commissioner shall forthwith refund the excess amount to the taxpayer together with interest at the rate per annum established from time to time by the commissioner pursuant to Section 3108 of this title. That interest shall be computed from forty-five days after the date the return was filed or from forty-five days after the date the return was due, including any extensions of time thereto, with respect to which the excess payntent was made, whichever is the later date.

Subchapter 4. Enforcement and Penalties

32 V.S.A. § 10411. Proceedings to recover tax

(a) Whenever any person required to collect a tax under this chapter shall fail to collect or pay over any tax, penalty or interest imposed by this chapter, the attorney general shall, upon the request of the commissioner, enforce the payment thereof on behalf of the state in any court of the state or of any other state of the United States.

(b) As an additional or alternate remedy, the commissioner may issue a warrant, directed to the sheriff of any county commanding him to levy upon and sell the real and personal property of any person liable for the tax, which may be found within his county, for the payment of the amount thereof, with any penalties and interest, and the cost of executing the warrant, and to return the warrant to the commissioner and to pay to him the money collected by virtue thereof within sixty days after the receipt of the warrant. The sheriff shall within five days after the receipt of the warrant file with the county clerk a copy thereof, and thereupon the clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax, penalties and interest for which the warrant is issued and the date when the copy is filed. Thereupon the amount of the warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued. The sheriff shall then proceed upon the warrant, in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner. If a warrant is returned not satisfied in full, the commissioner may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the state had recovered judgment therefor and execution thereon had been returned unsatisfied.

32 V.S.A. § 10412. Actions for collection of tax

(a) Action may be brought by the attorney general at the instance of the commissioner in the name of the state to recover the amount of taxes, penalties and interest due from a distributor,

provided such action is brought within six years after the same are due. Such action shall be returnable in the county where the distributor has a place of business or, if the distributor has no place of business in this state, the commissioner shall be returnable to Washington county. The limitation of six years in this section shall not apply to a suit to collect taxes, penalties, interest and costs when the distributor filed a fraudulent return or failed to file a return when the same was due.

32 V.S.A. § 10413. Presumptions and burden of proof

(a) For the purpose of the proper administration of this chapter and to prevent evasion of the tax hereby imposed, it shall be presumed that all gross receipts from the provision of satellite programming are subject to tax until the contrary is established, and the burden of proving that any receipt or amusement charge is not taxable hereunder shall be upon the person required to collect tax.

(b) The certificate of the commissioner to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied under this chapter shall be presumptive evidence thereof.

32 V.S.A. § 10414. Criminal penalties

(a) Failure to file; failure to collect; failure to remit. Any person who knowingly fails to file a return, fails to collect a tax or fails to remit a tax required under this subchapter shall be imprisoned not more than three years or fined not more than $10,000.00, or both.

(b) Any person who knowingly makes, signs, verifies or files with the commissioner a false or fraudulent tax return shall be imprisoned not more than one year or fined not more than $1,000.00, or both. Any person who with intent to evade a tax liability makes, signs, verifies or files with the commissioner a false or fraudulent tax return shall, if the amount of tax evaded is in excess of $500.00, be imprisoned not more than three years or fined not more than $10,000.00, or both.

32 V.S.A. § 10415. Notice and limitations of time

(a) Any notice under this chapter may be given by mailing it to the person for whom it is intended in a postpaid envelope addressed to that person at the address given in the last return filed by him under this chapter or in any application made by him or, if no return has been filed or application made, then to any address obtainable. The mailing of the notice shall be presumptive evidence of its receipt by the person to whom addressed. Any period of time which is determined under this chapter by the giving of notice shall commence to run from the date of mailing of the notice.

(b) The provisions of law relating to limitations of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken by the state or the commissioner to levy, appraise, assess, determine or enforce the collection of any tax or penalty under this chapter. However, except in the case of a willfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the later of the date of the filing of a return or the date a return is due, provided,

however, that when no return has been filed as provided by law the tax may be assessed at any time and further provided that where tax collected under this chapter has been under-reported by 20 percent or more such tax may be assessed at any time before the expiration of six years from the date of the filing of the return.

(c) When, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that the period be extended the amount of the additional tax due may be determined at any time within the extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period. If a taxpayer has consented in writing to the extension of the period for assessment, the period for filing an application for credit or refund pursuant to section 10376 of this title shall not expire prior to six months after the expiration of the period within which an assessment may be made pursuant to the consent to extend the time for assessment of additional tax.

32 V.S.A. § 10416. Review of commissioner's decision

(a) Any aggrieved taxpayer may, within thirty days after any decision, order, finding, assessment or action of the commissioner made under this chapter, appeal to the superior court. The appellant shall give security, approved by the commissioner, conditioned to pay the tax levied, if it remains unpaid, with interest and costs, as set forth in subsection (c) of this section.

(b) The appeal provided by this section shall be the exclusive remedy available to any taxpayer for review of a decision of the commissioner determining the liability of the taxpayer for the taxes imposed.

(c) Irrespective of any restrictions on the assessment and collection of deficiencies, the commissioner may assess a deficiency after the expiration of the period specified in subsection (a) of this section, notwithstanding that a notice of appeal regarding the deficiency has been filed by the taxpayer, unless the taxpayer, prior to the time the notice of appeal is filed, has paid the deficiency, has deposited with the commissioner the amount of the deficiency, or has filed with the commissioner a bond (which may be a jeopardy bond) in the amount of the portion of the deficiency (including interest and other amounts) in respect of which review is sought and all costs and charges which may accrue against the taxpayer in the prosecution of the proceeding, including costs of all appeals, and with surety approved by the county court conditioned upon the payment of the deficiency (including interest and other amounts) as finally determined and all costs and charges. If as a result of a waiver of the restrictions on the assessment and collection of a deficiency any part of the amount determined by the commissioner is paid after the filing of the appeal bond, the bond shall, at the request of the taxpayer, be proportionately reduced.

32 V.S.A. § 10417. Liens

If any person required to pay or collect and transmit a tax under this chapter neglects or refuses to pay the same after demand, the amount, together with all penalties and interest provided for in this chapter and together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of Vermont upon all property and rights to property, whether real or personal, belonging to such person. Such lien shall arise at the time demand is made by the

commissioner of taxes and shall continue until the liability for such sum with interest and costs is satisfied or becomes unenforceable. Such lien shall have the same force and effect as the lien for taxes under chapter 151 of this title, as provided in section 5895 of this title, and notice of such lien shall be recorded as is provided in said section, Certificates of release of such lien shall also be given by the commissioner as in the case of the aforesaid tax liens.

SECTION 2, EFFECTIVE DATE

This act shall take effect on and shall apply to all gross receipts from satellite programming provided on or after that date.

COMPARISON TABLE

VERMONT TAX STRUCTURE BETWEEN CABLE CUSTOMERS AND SATELLITE CUSTOMERS IS UNFAIR AND UNBALANCED.

The satellite industry has approximately 120,000 customers in Vermont and 31 million nationally. The wide array of local and state taxes and fees that apply only to the Vermont cable television industry puts us at a competitive disadvantage against the fast-growing satellite industry. Most importantly, Vermont continues to close $5 to $7 million annually by not equalizing that cable/satellite tax burden. The following is a brief analysis of the relative tax burdens placed on the Vermont cable television industry and the satellite TV industry:

		Vermont Cable Television Industry	**DirecTV**	**DishTV**
1.	Personal Property Taxes Paid to Municipalities?	YES	NO	NO
2.	Real Estate Taxes Paid to Municipalities?	YES	NO	NO
3.	Motor Vehicles Excise Taxes Paid to the State?	YES	NO	NO
4.	Percentage of Revenue Paid to Support Public Access Channels?	YES	NO	NO
5.	Percentage of Revenue Paid to Support Government Access Channels	YES	NO	NO
6.	Percentage of Revenue Paid to Support Educational	YES	NO	NO
7.	High Speed Broadband	YES	NO	NO
8.	Free High-Speed Internet and Video to Schools and Libraries?	YES	NO	NO
9.	Free video service to all municipal buildings?	YES	NO	NO
10.	Employees in Vermont?	YES	NO	NO
11.	Regulatory Fees Paid to the State?	YES	NO	NO
12.	Payroll Taxes Paid to Vermont?	YES	NO	NO
13.	Vehicles in Vermont?	YES	NO	NO
14.	Customer Service Centers in Vermont?	YES	NO	NO
15.	Corporate Donations and Philanthropy to charities and non-profits?	YES	NO	NO
16.	Free Cable in the Classroom Programming and Free Study Guides?	YES	NO	NO
17.	Vermont Specific Infrastructure Expenditures?	YES	NO	NO

Dated: January, 2013

NO SST IMPACT

SUTHERLAND

1275 Pennsylvania Avenue, NW
Washington, DC 20004-2415
202.383.0100 Fax 202.637.3593
www.sutherland.com

ATLANTA
AUSTIN
HOUSTON
NEW YORK
TALLAHASSEE
WASHINGTON DC

STEPHEN P. KRANZ
DIRECT LINE: 202.383.0267
E-mail: steve.kranz@sutherland.com

December 21, 2009

VIA E-MAIL

Paul Cianelli
New England Cable & Telecommunications Assn., Inc.
10 Forbes Rd., Suite 440 West
Braintree, Massachusetts 02184

Re: Tax on Satellite Television Programming Act; Streamlined Sales and Use Tax Agreement Conformity

Dear Mr. Cianelli:

I am writing to confirm our view that the draft *Tax on Satellite Television Programming Act* ("Act") does not impact Vermont's compliance with the Streamlined Sales and Use Tax Agreement ("Agreement"). As discussed further below, neither the Agreement's stated purpose nor any specific provision thereof restricts or prohibits the Act's excise tax on satellite programming.

If enacted, the Act would impose a six percent excise tax on the provision of satellite programming sold to a subscriber in Vermont. However, the Act allows the distributor of satellite programming to passthrough the excise tax to its subscribers. The State Tax Commissioner in the Department of Taxes would administer the Act's excise tax.

The "fundamental purpose" of the Agreement is to "simplify and modernize *sales and use tax* administration in the member states." *See* SSUTA § 102 (emphasis added). Vermont imposes a six percent sales and use tax on the sale or use of the "access to cable television systems or other audio or video programming systems that operate by wire, cable, coaxial, lightwave, microwave, satellite transmissions or other similar means." 32 V.S.A. § 9771(4); Code of Vt. Rules 1.9771(4)-1. While Vermont imposes sales and use tax on video programming services (*e.g.*, cable and satellite services), the Act does not undermine the Agreement because it does not implicate the existing provisions of Vermont's sales and use tax law, as set forth in Chapter 233 of Title 32 of the Vermont Statutes Annotated. Accordingly, the

excise tax established by the Act has no effect on Vermont's membership in the Agreement in any way.

Further, no specific requirements or prohibitions for membership in the Agreement would be impacted should Vermont enact the Act. In particular, the Act would not affect either the "one rate" requirement imposed by Section 308 the Agreement, the recently adopted "replacement tax" prohibition, or any other provision of the Agreement. Thus, it is our view that the Agreement does not impact Vermont's ability to adopt the proposed excise tax on satellite programming.

Should you have any questions regarding the scope, purpose, requirements, or prohibitions of the Agreement, please contact me at 202.383.0267 or steve.kranz@sutherland.com.

Regards,

Stephen P. Kranz

6TH CIR. CT. APPEALS

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 07a0201p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DIRECTV, INC. and ECHOSTAR SATELLITE L.L.C.,
Plaintiffs-Appellants,

v.

MARK TREESH, COMMISSIONER FOR THE DEPARTMENT OF REVENUE FOR THE STATE OF KENTUCKY,
Defendant-Appellee.

No. 06-5523

Appeal from the United States District Court
for the Eastern District of Kentucky at Frankfort.
No. 05-00024—Karen K. Caldwell, District Judge.

Argued: January 23, 2007

Decided and Filed: May 31, 2007

Before: BOGGS, Chief Judge; and MERRITT and MOORE, Circuit Judges.

COUNSEL

ARGUED: Pantelis Michalopoulos, STEPTOE & JOHNSON, Washington, D.C., for Appellants. Douglas M. Dowell, OFFICE OF LEGAL SERVICES FOR REVENUE, Frankfort, Kentucky, for Appellee. **ON BRIEF:** Pantelis Michalopoulos, Lincoln L. Davies, Mark F. Horning, STEPTOE & JOHNSON, Washington, D.C., Kenneth S. Handmaker, Bradley E. Cunningham, MIDDLETON REUTLINGER, Louisville, Kentucky, for Appellants. Douglas M. Dowell, Laura M. Ferguson, OFFICE OF LEGAL SERVICES FOR REVENUE, Frankfort, Kentucky, for Appellee. Burt A. Braverman, Timothy P. Tobin, COLE, RAYWID & BRAVERMAN, Washington, D.C., Jackson W. White, Lexington, Kentucky, for Amicus Curiae.

OPINION

BOGGS, Chief Judge. Directv, Inc. and Echostar Satellite L.L.C., collectively "the satellite companies," appeal from the district court's dismissal of their claims against Mark Treesh, the Commissioner of the Department of Revenue for the state of Kentucky. The satellite companies seek a permanent injunction against certain provisions recently added to Kentucky's revenue statutes that afford cable television operators credits and other relief from state taxes assessed against both cable companies and the satellite companies. The satellite companies contend that these credits

unconstitutionally discriminate against interstate commerce in violation of the Commerce Clause of Article I of the Constitution. Because we find no constitutional violation, we affirm the judgment of the district court.

I

a. The Satellite and Cable Companies

The satellite companies provide multi-channel video programming to subscribers by means of satellites stationed above the Earth. The federal government auctioned the right to transmit on certain electromagnetic frequencies, and the satellite companies paid more than $700 million for these rights. The satellite companies allege that they have further invested more than $1 billion in building, insuring, and launching their satellites. Subscribers in Kentucky receive the signals from these satellites by means of small satellite dishes mounted on or near their houses. According to their complaint, the satellite companies "employ no infrastructure in the State to transmit their signal directly to the subscriber and do not use public rights-of-way in providing service." The district court noted, however, that according to the *amicus curiae* brief of the Kentucky Cable Television Association ("KCTA"), the satellite companies do have "local receiving facilities" on the ground in Kentucky, which receive the signals of local broadcast stations and include them in their offerings with the channels sent by satellite. In their complaint, the satellite companies state that Directv has two sales employees in Kentucky and that EchoStar has six sales employees in Kentucky. The district court noted that, according to the KCTA, the satellite companies employ a "legion" of local contractors in Kentucky to sell their services and receiving dishes.

Cable companies, on the other hand, provide multi-channel video programming by means of cable networks located in Kentucky. Cable systems receive the programming that they retransmit to subscribers at local cable headends. The cable headends then transmit the programming to Kentucky subscribers by way of cables laid in trenches in or along roads or hung on utility poles in the state and connected to the subscribers' television sets and set-top boxes. In their complaint, the satellite companies assert that cable companies must obtain local government permission to use roads and other rights-of-way in order to lay or string cable connecting their local distribution facilities to the subscribers' homes. Local governments typically provide this permission by franchise agreements and permits granted to the cable companies. The satellite companies assert that in return for permission to use public rights-of-way, the cable companies pay a franchise fee to the applicable local government that is typically five percent of gross revenue within the franchise area. The satellite companies characterize the franchise fee as "compensation to the local government for valuable rights granted by the franchise." The satellite companies allege that cable operators have a "strong local presence in Kentucky due to the employment of numerous Kentucky residents and the location of numerous offices and facilities within the state to provide service." Finally, the satellite companies allege that when a customer wishes to purchase a subscription to multi-channel television service, there are basically only two choices: cable or satellite.

b. The Changes to Kentucky's Tax Law

In March 2005, Kentucky amended its tax laws. *See* 2005 Ky. Acts 168, Ky. H.B. No. 272, 2005 Regular Session (2005) (the "2005 amendments") (relevant provisions codified at various sections of Chapter 136 of the Kentucky Revised Statutes).

Prior to the 2005 Amendments, neither the cable companies nor the satellite companies were required to pay Kentucky state sales tax. In addition, pursuant to § 602(a) of the federal Telecommunications Act of 1996, the satellite companies, but not the cable companies, were and are exempt from all local taxes and fees. Pub. L. No. 104-104, Title VI, § 602(a), 110 Stat. 144(a)(1996) (reprinted at 47 U.S.C. § 152, historical and statutory notes). Nevertheless, the

Telecommunications Act explicitly reserves to states the powers the states themselves had to tax satellite companies. *Ibid.* Meanwhile, as stated above, the cable companies paid franchise fees to local governments.

The Kentucky legislature passed the 2005 Amendments in order to provide "a fair, efficient, and uniform method for taxing communications services sold" in Kentucky and to simplify "an existing system that includes a myriad of levies, fees, and rates imposed at all levels of government." KRS § 136.600(1), (3). The 2005 amendments became effective on January 1, 2006.

Section 90 of the 2005 Amendments imposes an excise tax on the retail purchase of multichannel video programming service provided to a person whose place of primary use is in the state. KRS § 136.604(1). The amendments define "multichannel video programming service" as "cable service and satellite broadcast and wireless cable service." *Id.* § 136.602(8). The excise tax is 3% of the sales price charged for the service. *Id.* § 136.604(2). Section 96 of the 2005 Amendments imposes a 2.4% tax on a multichannel video programming service provider's gross revenues from service provided to people in Kentucky. *Id.* § 136.616(1), (2)(a). Together, these provisions effectively impose a 5.4% tax on total charges for either cable or satellite.

Section 112 of the 2005 Amendments establishes a gross revenues and excise tax fund. KRS § 136.648(1). All revenues from the taxes described above are to be deposited into this fund. The money in the fund is then to be allocated among the state and its political subdivisions, school districts, and special districts. *Id.* § 136.648(3). Under Section 113 of the 2005 Amendments, every "political subdivision, school district, special district, and sheriff's department" must certify to the Revenue Cabinet the total local franchise fees it collected from multichannel video programming service providers in fiscal year 2005. *Id.* § 136.650(1). This certified amount is then used to determine the monthly portion of the gross revenues and excise tax fund that will be distributed to each subdivision, school district, and special district. The 2005 Amendments provide that each will be assigned a percentage, called the "local historical percentage," which is based on the amount of the subdivision's certified collections as a proportion of the total certified amount of all collections of all parties participating in the fund. In return for their participation in this fund, the subdivisions must agree to relinquish any right to a franchise fee or tax on multichannel video programming services. *Id.* § 136.650(1)(b).

Pursuant to Section 118 of the 2005 Amendments, local governments are prohibited from levying any franchise fee or tax on a multichannel video programming service. KRS § 136.660. If a local government imposes or attempts to impose a franchise fee or tax, the local government may not receive any share of the proceeds of the excise and gross revenues taxes for the period that the imposition occurs. *Id.* § 136.660(4). Further, if a provider of a multichannel video programming service actually pays a franchise fee or tax with respect to the service, the provider is entitled to a credit against the state taxes due in the amount of the franchise fee or tax. *Id.* § 136.660(5).

c. The Satellite Companies' Complaint

The satellite companies allege that the provisions of the 2005 Amendments that "afford cable system operators credits against the state excise and gross revenues taxes and relief from franchise fees unconstitutionally discriminate against interstate commerce in violation of the Commerce Clause." The satellite companies ask the court to declare KRS § 136.660(4), (5) unconstitutional. These are the subsections of the 2005 Amendments prohibiting local governments from levying franchise fees and taxes, denying local governments fund proceeds if they levy such fees, and crediting providers of multichannel video programming services for any such fees paid. In effect, they argue that if a state imposes uniform taxes on all multi-channel video programming providers, it also is constitutionally required that the state allow its localities and subdivisions to charge significant franchise fees.

The satellite companies argue that with the new provisions the cable companies receive a tax preference because revenues from the state excise and gross revenues tax are used to pay the franchise fees that cable operators would otherwise have to pay local governments for access to local rights-of-way. This discriminates against interstate commerce because cable companies, which provide service via infrastructure necessarily located within the state, get the tax preference while satellite companies, which provide service via satellites inherently located outside of the state, get no tax preference. In other words, the cable companies pay the new taxes but get relief from a portion of their operating costs, i.e., the price paid for the right to provide cable service in the franchise area and rights of access to public rights-of-way. The satellite companies pay the new taxes, but receive no relief from their operating costs. According to the satellite companies, this constitutes discrimination against interstate commerce because the burdened entities – the satellite companies – employ inherently out-of-state facilities and have very little in-state infrastructure, while the benefitted entities – the cable companies – employ necessarily expansive in-state facilities to deliver their television service.

II

We review a grant of a Rule 12(b)(6) motion to dismiss *de novo*. *See, e.g.*, *Golden v. City of Columbus*, 404 F.3d 950, 958 (6th Cir.), *cert. denied*, 126 S. Ct. 738 (2005). "[A] Rule 12(b)(6) motion should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Ricco v. Potter*, 377 F.3d 599, 602 (6th Cir. 2004) (quotation omitted). In reviewing a motion to dismiss, we construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff. *See Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 228 (6th Cir. 2005). The defendant has the burden of showing that the plaintiff has failed to state a claim for relief. *Carver v. Bunch*, 946 F.2d 451, 454-55 (6th Cir. 1991). While all the factual allegations of the complaint are accepted as true, "we need not accept as true legal conclusions or unwarranted factual inferences." *Gregory v. Shelby County*, 220 F.3d 433, 446 (6th Cir. 2000) (citation omitted).

III

The satellite companies first argue that the district court erred by relying on factual assumptions that were neither alleged in their complaint nor consistent with the complaint's allegations. The satellite companies argue that this improperly converted the motion to dismiss into a motion for summary judgment. Specifically, the satellite companies argue that the district court substituted its own factual assumptions, largely drawn from the KCTA *amicus* brief, for the factual allegations in the satellite companies' complaint, and that the district court faulted plaintiffs for not coming forward with evidence to support their allegations.

At some times in its opinion, the district court appears to have made factual assumptions that may be controverted. While the satellite companies alleged that they used no infrastructure whatsoever within the state to deliver programming, the district court found that "the mechanisms by which the . . . Satellite Companies deliver programming lie partially outside of Kentucky and partially inside the state." The district court specifically pointed to the receiving dishes for local programming mentioned in the KCTA brief as an example of the in-state infrastructure. Further, the district court faults the satellite companies for the lack of "evidence in the record" to support the principal places of business of the satellite and cable companies, and the failure of the satellite companies to "presen[t] any other evidence" from which the district court could conclude that cable companies are in-state economic interests.

If the district court's decision were actually predicated upon the above factual findings or the failure of plaintiffs to present the specified evidence, it would have been error. "[U]nder the notice pleading standard of the Federal Rules, courts are reluctant to dismiss colorable claims which

have not had the benefit of factual discovery." *Evans-Marshall*, 428 F.3d at 228. Further, it does not appear that the satellite companies were given a "reasonable opportunity to present all material made pertinent to the issue" as required by Fed. R. Civ. P. 12(b) when a district court converts a motion to dismiss into a motion for summary judgment.

The district court's opinion, however, was not clearly predicated upon its additional factual findings or its finding of lack of evidence. Several of the district court's reasons for dismissal were not based on these additional findings. Therefore, ignoring the above flaws in the district court's opinion, the relevant question on appeal is whether the district court properly found that, even accepting all of the facts in the satellite companies' complaint as true, the complaint failed to demonstrate that the 2005 Amendments discriminate against interstate commerce.

IV

The Constitution expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States," U.S. Const. art. I, § 8, cl. 3, and the "negative" or "dormant" aspect of the Commerce Clause implicitly limits a state's right to tax interstate commerce. In *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977), the Court provided a concise exegesis of the dormant aspect of the Commerce Clause:

> [W]e begin with the principle that "[the] very purpose of the Commerce Clause was to create an area of free trade among the several States." *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). It is now established beyond dispute that "the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman v. Hewit*, 329 U.S. 249, 252 (1946). The Commerce Clause does not, however, eclipse the reserved "power of the States to tax for the support of their own governments," *Gibbons v. Ogden*, 9 Wheat. 1, 199 (1824), or for other purposes . . . rather, the Clause is a limit on state power. Defining that limit has been the continuing task of this Court. On various occasions when called upon to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers, the Court has counseled that the result turns on the unique characteristics of the statute at issue and the particular circumstances in each case. *E.g.*, *Freeman v. Hewit* .... This case-by-case approach has left "much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457 (1959).

Id. at 328-29.

A tax provision satisfies the requirements of the Commerce Clause if (1) the activity taxed has a substantial nexus with the taxing state; (2) the tax is fairly apportioned to reflect the degree of activity that occurs within the state; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to benefits provided by the state. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The satellite companies only challenge Kentucky's amended tax law on ground (3).

The Commerce Clause "does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336-37 (1977). The Supreme Court has never precisely

delineated the scope of the doctrine that bars discriminatory taxes. The Court has made it clear, however, that a tax statute's "constitutionality does not depend upon whether one focuses upon the benefitted or the burdened party." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984).

In general, a challenged credit or exemption will fail Commerce Clause scrutiny if it discriminates on its face, or if, on the basis of a "sensitive, case-by-case analysis of purposes and effects," the provision "will in its practical operation work discrimination against interstate commerce," *West Lynn Creamery v. Healy*, 512 U.S. 186, 201 (1994) (citations omitted), by "providing a direct commercial advantage to local business." *Bacchus Imports*, 468 U.S. at 268 (citations omitted). "'Discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). A state tax provision that discriminates against interstate commerce is invalid unless "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 101 (citation omitted).

A statute found to discriminate against interstate commerce "is virtually *per se* invalid." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996) (citation omitted). Once discrimination is shown, the heavy burden to prove the law's validity falls on the state. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986).

On appeal, the satellite companies argue solely that the 2005 Amendments discriminate against interstate commerce in practical effect. *West Lynn Creamery*, 512 U.S. at 201. The satellite companies complain that what they call the "tax and subsidy" approach, taken by Kentucky in the 2005 Amendments, is a sham. According to the satellite companies, while the Amendments purport to prohibit franchise fees from being assessed against all multi-channel broadcast services, in fact, only cable companies have been required to pay local franchise fees. Therefore, only they will benefit from this provision, while the satellite companies garner no benefit.

As an initial matter, the satellite companies do not contend that if Kentucky had solely imposed an equal state tax on both satellite companies and cable companies, without providing a credit for the cable companies' franchise fees or banning those fees, that such a tax would violate the Commerce Clause. Nor does it appear that Kentucky would have violated the Commerce Clause had it solely banned local governments from imposing franchise fees on cable companies. The nature of the franchise fees are somewhat disputed. As this case is before us on a motion to dismiss, we will accept the contention of the satellite companies that these franchise fees are at least compensatory in part; that they are collected in order to compensate the local governments for the cable companies' use of the rights-of-way, utility poles, etc. However, there is no allegation of any significant cost to the city of providing this access to the cable companies.

States and local government are under no mandate to charge for the use of local rights-of-way; this is readily apparent from the fact that not every road is a toll road. States have wide latitude "to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336-37. The provision of access to the state infrastructure free of charge is an acceptable option that the state may exercise.[1] While the Supreme Court has struck down state regulations that charged out-of-state truckers and in-state truckers the same flat fees for the use of the state highways because the in-state truckers use the highways more frequently, *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 282 (1987), there is no indication that states would violate the Commerce Clause by foregoing such fees entirely, even though the lack of such a fee would benefit local truckers more than out-of-state truckers. *See West Lynn Creamery*, 512 U.S. at

[1]The Court has indicated that even direct monetary subsidies to in-state companies often will not violate the Commerce Clause. *See West Lynn Creamery*, 512 U.S. at 199 n.15.

199 n.15 ("[I]t is undisputed that States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads . . . ." (citing *Zobel v. Williams*, 457 U.S. 55, 67 (1982) (Brennan, J., concurring))).

Yet, as the Court has recognized in *West Lynn Creamery*, a tax and a subsidy, each of which would be constitutional standing alone, might together be unconstitutional. 512 U.S. at 199-200. The satellite companies analogize Kentucky's new taxation regime to the one found to violate the dormant Commerce Clause in *West Lynn Creamery*. In that case, Massachusetts required all milk dealers in the state to contribute to a price equalization fund regardless of whether they bought milk from in-state or out-of-state producers. The state then distributed the proceeds of that fund solely to Massachusetts dairy producers, but not to their out-of-state counterparts. The court found that this violated the Commerce Clause: "Although the tax also applies to milk produced in Massachusetts, its effect on Massachusetts producers is entirely . . . offset by the subsidy provided exclusively to Massachusetts dairy farmers." *West Lynn Creamery*, 512 U.S. at 194. Massachusetts argued that either the tax or the subsidy standing alone would be constitutional, therefore, the combination must be constitutional as well. The Court rejected that contention, concluding that, even assuming that each component would be constitutional standing alone, "[b]y conjoining a tax and a subsidy, Massachusetts has created a program more dangerous to interstate commerce than either part alone." *Id.* at 199-200.

The instant case differs from *West Lynn Creamery* in several important respects. First, the claimed subsidy is not a direct monetary subsidy, but is instead only the right to conduct business and use local rights-of-way without local taxation or fees. Second, in *West Lynn Creamery*, the "purpose and effect" of the tax and subsidy was "to divert market share" from an out-of-state good to an identical in-state good. *Id.* at 203. In this case, however, the two "goods" are distinct, consisting of two very different means of delivering broadcasts. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978) (holding that the Commerce Clause does not "protect[] the particular structure or methods of operation in a retail market."). Further, the purposes of the 2005 Amendments include non-market share related goals, such as simplifying the labyrinthine system of fees cable companies currently face and collecting taxes from the previously untaxed, burgeoning satellite industry.

The "paradigmatic example" of a law that violates the dormant Commerce Clause is the protective tariff, which taxes goods produced in other states but not those produced in-state. *West Lynn Creamery*, 512 U.S. at 193. Such tariffs are so clearly unconstitutional that states hardly ever enact them. *Ibid.* Yet other measures are the functional equivalent of such tariffs, such as enacting a facially neutral tax on all liquor and exempting liquor produced locally from the tax. *Bacchus Imports*, 468 U.S. at 263. In *West Lynn Creamery*, the Court found a tariff disguised as a tax and subsidy. The purpose and effect of that scheme was solely to raise the price of out-of-state milk and lower the price of in-state milk.

The satellite companies' allegations are insufficient to demonstrate that the 2005 Amendments create the functional equivalent of a protective tariff. With the Amendments, the state has simply prevented localities from mulcting cable companies through franchise fees, and substituted a uniform state taxation scheme. It has not otherwise altered any competitive balance among in and out-of-state competitors.

Further, a protective tariff is so clearly problematic because its only possible purpose is to benefit in-state interests at the expense of out-of-state interests – likewise an industry-specific tax and subsidy scheme. *See Note: Functional Analysis, Subsidies, and the Dormant Commerce Clause*, 110 Harv. L. Rev. 1537, 1552-54 (1997). Unlike a protective tariff, however, the purposes of Kentucky's 2005 Amendments are much more diffuse. While *a* purpose of the Amendments might have been to aid the cable industry rather than the satellite industry because the former has a larger

in-state presence than the latter, there were clearly *many other* purposes including assessing some tax against a satellite industry that is rapidly growing, and simplifying the current morass of local taxes and franchise fees that cable companies face. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (upholding a state policy clearly motivated in part by a desire to improve the state's environment, despite any concurrent protectionist motivations). The satellite companies' opinion of the 2005 Amendments might be very different had they been subjected to the tangled regime of local taxation and franchise fees, as they certainly could have been absent the special exemption granted to them by the Telecommunications Act. 47 U.S.C. § 152, historical and statutory notes. Beyond that, because satellite and cable television differ significantly in their means of operation, Kentucky may have wished to remove any barriers it had put in place to the continued viability of cable for reasons entirely unrelated to geography – for example, that cable providers often provide internet access as well, that cable providers are more likely to provide public access channels, etc. None of these reasons are explicitly given by Kentucky in support of the Amendments, but the possibility that they in some way motivated the Kentucky legislature's actions is the reason that the Supreme Court has held that the dormant Commerce Clause is intended to protect interstate commerce, and not particular firms engaged in interstate commerce, or the modes of operation used by those firms. *Exxon Corp.*, 437 U.S. at 126-28; *see also Amerada Hess Corp. v. Director, Div. of Taxation, N. J. Dep't of the Treasury*, 490 U.S. 66, 78 (1989) (holding that the differential tax treatment of "two categories of companies result[ing] solely from differences between the nature of their businesses, [and] not from the location of their activities" does not violate the dormant Commerce Clause.).

We must be cautious about applying the dormant Commerce Clause in cases that do not present the equivalent of a protective tariff. States must be allowed, and even encouraged, to work "to attract business by creating an environment conducive to economic activity." Applying the dormant Commerce Clause to invalidate Kentucky's revenue statute in this case would dramatically increase the clause's scope and limit states' "right to experiment with different incentives to business," *Alexandria Scrap*, 426 U.S. at 817 (Stevens, J., concurring), or to implement "effective and creative programs for solving local problems." *Reeves*, 447 U.S. at 441. Kentucky's banning of local franchise fees can serve many purposes and have many effects other than arguably reducing a cost previously borne by one type of competitor in the marketplace. After a "sensitive . . . analysis of [the] purposes and effects" of the 2005 Amendments, we are unable to find that such action "will in . . . practical operation work discrimination against interstate commerce." *West Lynn Creamery*, 512 U.S. at 201.[2]

V

Accordingly, for the reasons set out above, we AFFIRM the district court's grant of Treesh's motion to dismiss.

---

[2]Upon appeal, Treesh argues that Congress explicitly approved the type of taxation that Kentucky implemented with the 2005 Amendments. *See* 47 U.S.C. § 152, historical and statutory notes. Congress may authorize state regulation that would otherwise violate the dormant Commerce Clause. *Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992). Because we affirm the district court's judgment on other grounds, it is unnecessary for us to decide this question.

4TH CIR. CT. APPEALS

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

DIRECTV, INCORPORATED; ECHOSTAR SATELLITE, L.L.C.,
Plaintiffs-Appellants,

v.

E. NORRIS TOLSON, in his official capacity as Secretary of Revenue,
Defendant-Appellee.

NORTH CAROLINA CABLE TELECOMMUNICATIONS ASSOCIATION,
Amicus Supporting Appellee.

No. 07-1250

Appeal from the United States District Court
for the Eastern District of North Carolina, at New Bern.
Louise W. Flanagan, Chief District Judge.
(5:05-cv-00784-FL)

Argued: December 5, 2007

Decided: January 10, 2008

Before NIEMEYER and SHEDD, Circuit Judges, and
Leonie M. BRINKEMA, United States District Judge for the
Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Shedd wrote the opinion, in which Judge Niemeyer and Judge Brinkema joined.

COUNSEL

ARGUED: Pantelis Michalopoulos, STEPTOE & JOHNSON, L.L.P., Washington, D.C., for Appellants. Michael David Youth, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Mark F. Horning, Janice D. Gorin, STEPTOE & JOHNSON, L.L.P., Washington, D.C.; Christopher G. Smith, J. Mitchell Armbruster, SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P., Raleigh, North Carolina, for Appellants. Christopher G. Browning, Jr., Solicitor General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee. Mark J. Prak, Marcus W. Trathen, Charles F. Marshall, BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P., Raleigh, North Carolina, for Amicus Supporting Appellee.

OPINION

SHEDD, Circuit Judge:

Plaintiffs DIRECTV, Inc. and Echostar Satellite, LLC, providers of satellite television programming, brought this suit claiming that North Carolina's system of taxing multi-channel television programming violates the Dormant Commerce Clause of Article I of the United States Constitution. The district court granted Defendant E. Norris Tolson's motion to dismiss, concluding that Plaintiffs' suit is barred by the Tax Injunction Act and principles of comity, that Plaintiffs lack standing, and that Plaintiffs failed to state a claim on which relief can be granted. We hold that Plaintiffs' suit is barred by principles of comity and therefore affirm.

I

A.

Consumers have two main choices for the purchase of subscription multi-channel television programming: traditional "cable" providers and direct broadcast satellite ("DBS") providers. Both types of service

provide substantially the same programming, but each uses a different means to deliver that programming to subscribers.

Cable providers deliver their programming through networks of coaxial or fiber optic cables laid in trenches, alongside roads, or hung on utility poles. These networks are physically connected to subscribers' homes. Thus, cable providers rely on the use of public rights-of-way for the delivery of their programming. Historically, cable providers in North Carolina have been required to obtain franchises from city and county governments entitling them to operate within designated franchise areas. In exchange for these franchises, local governments, with the authorization of the North Carolina General Assembly, have typically levied franchise taxes on cable providers.

By contrast, DBS providers transmit their programming from satellites orbiting the earth from space directly to satellite dishes mounted on or near subscribers' homes. Accordingly, DBS providers do not rely on public rights-of-way for the delivery of their programming, and federal law prohibits local governments from charging franchise taxes or fees to DBS providers. Telecommunications Act of 1996, Pub. L. No. 104-104, Title VI, § 602(a), 110 Stat. 144 (1996) (reprinted at 47 U.S.C. § 152, historical and statutory notes).

B.

North Carolina has amended its taxation of multi-channel television programming several times in recent years. Prior to 2002, neither satellite nor cable TV providers were subject to sales tax on their gross receipts. At the same time, cities and counties had statutory authority to grant franchises to cable operators, *see* N.C. Gen. Stat. §§ 160A-319 and 153A-137 (West 2001), and to levy a "franchise tax" — typically 5% of cable operators' gross receipts in the franchise area — in exchange for those franchise rights. *See* N.C. Gen. Stat. §§ 160A-214 and 153A-154 (West 2001).

Beginning in 2002, North Carolina imposed a 5% sales tax on the gross receipts of DBS providers. *See* N.C. Gen. Stat. § 105-164.4(a)(6) (West 2005). Cable operators continued to pay franchise taxes to localities as they had done before. The net effect of the tax, therefore, was that both cable and DBS providers paid 5% of their

gross receipts to the State and/or its political subdivisions. Plaintiffs unsuccessfully challenged this scheme on Commerce Clause grounds in North Carolina state court. *See DIRECTV, Inc. v. State*, 632 S.E.2d 543 (N.C. Ct. App. 2006).

Beginning in 2005, North Carolina imposed a sales tax of 7% on the gross receipts of both cable and DBS providers. *See* N.C. Gen. Stat. §§ 105-164.3(4a) and 105-164.4(a)(6) (West 2006). Cable providers continued to pay franchise taxes to local governments, but were permitted to take a credit against the state sales tax in the amount they paid in local franchise taxes. *See* N.C. Gen. Stat. § 105-164.21B (West 2005). The net effect of this scheme was that both satellite and cable providers paid 7% of their gross receipts to the State and/or its political subdivisions.

In 2006, further amendments to North Carolina's taxation of multichannel television providers created the tax scheme at issue in this lawsuit. *See* An Act to Promote Consumer Choice in Video Service Providers and to Establish Uniform Taxes for Video Programming Services, 2006 N.C. Sess. Laws 2006-151 (the "2006 Amendments"). The 2006 Amendments revoked the authority of local governments to charge franchise taxes to cable providers and vested franchising authority with the North Carolina Secretary of State. *See id.* §§ 1, 10-13. At the same time, the 2006 Amendments eliminated the tax credit available to cable providers, subjecting them to the full 7% state sales tax on gross receipts. *See id.* § 9. The 2006 Amendments also provide that a portion of the proceeds of the state sales tax on cable and DBS providers be distributed to local governments. For those local governments that previously imposed franchise taxes on cable providers, the amount of this distribution is based on the revenue formerly generated by those taxes. *See id.* § 8, (adding N.C. Gen. Stat. § 105-164.44I). Counties or cities that did not charge franchise taxes also receive a portion of the state tax revenue under the 2006 Amendments, in amounts based on their populations. *See id.* Accordingly, just as they did in 2005, both cable and DBS providers now pay taxes equal to 7% of their gross receipts. Those taxes, however, are paid only to the State, which in turn distributes a portion of the proceeds to local governments according to state law.

II

A.

We turn briefly to a discussion of the constitutional principles underlying Plaintiffs' claims. The Commerce Clause provides that Congress "shall have the power . . . [t]o regulate Commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3. This grant of affirmative Congressional authority carries with it an implied or "dormant" restriction of the power of states to regulate interstate commerce, prohibiting them from enacting laws that impose "substantial burdens" on commerce between the states. *Dennis v. Higgins*, 498 U.S. 439, 447 (1991) (internal quotation and citation omitted). The clearest example of a state law that violates the Dormant Commerce Clause is one that facially discriminates against interstate commerce, such as a protective tariff or customs duty. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994); *see also Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). Even a facially neutral state law, however, violates the Dormant Commerce Clause "when its effect is to favor in-state economic interests over out-of-state interests." *Brown-Forman*, 476 U.S. at 579. Likewise, a state runs afoul of the Dormant Commerce Clause even when it joins an otherwise constitutional tax with an otherwise constitutional subsidy in a way that benefits in-state economic interests and burdens out-of-state interests. Thus, in *West Lynn*, the Supreme Court struck down a Massachusetts milk pricing order that combined a nondiscriminatory tax on milk sales with an otherwise permissible subsidy of Massachusetts dairy farmers because, taken together, the two provisions had a discriminatory effect. 512 U.S. at 199-202. The Court emphasized that state economic regulation must be considered as a whole, and found particularly troubling the fact that the proceeds from the tax were used to create a "subsidy to one of the groups hurt by the tax" — *i.e.*, the in-state dairy farmers. *Id.* at 200.

B.

Plaintiffs are the two main providers of DBS service in North Carolina and nationally and are two of only three companies that own and operate DBS satellites. They brought this suit in 2005 under 42 U.S.C. § 1983, alleging that North Carolina's tax credit for cable pro-

viders violated the Dormant Commerce Clause because the credit was granted to companies based on their in-state distribution of television programming. After the 2006 Amendments became effective, Plaintiffs amended their complaint to challenge North Carolina's present tax scheme. Plaintiffs seek a declaratory judgment that sections 8 through 15 of the 2006 Amendments violate the Dormant Commerce Clause, a permanent injunction barring the State from enforcing section 8 of the 2006 Amendments, and attorneys' fees and costs.

Plaintiffs argue that North Carolina's present taxation scheme is no different from that struck down by the Supreme Court in *West Lynn*, because it combines an evenhanded tax on sales of subscription multichannel television programming with a subsidy available only to cable providers and funded from the proceeds of the tax. Although no distributions of sales tax proceeds are made directly to cable providers, and although not all localities that do receive these distributions previously charged franchise taxes, Plaintiffs argue that an unconstitutional subsidy exists because "[c]able providers no longer have to pay franchise fees, but continue to receive the valuable right of access to publicly owned rights-of-way they formerly obtained through the payment of such fees." J.A. 126. There is no constitutional difference, Plaintiffs claim, between payments directly to cable providers and the distributions made to North Carolina's political subdivisions under the 2006 Amendments. Plaintiffs argue that the alleged subsidy imposes a significant cost disadvantage on DBS providers, who are forced to fund the subsidy. Plaintiffs further claim that because DBS providers use out-of-state distribution facilities and cable operators necessarily use in-state distribution facilities, the subsidy discriminates against DBS providers in violation of the Dormant Commerce Clause.

The district court dismissed Plaintiffs' amended complaint on several grounds. First, the district court held that Plaintiffs' suit is barred by the Tax Injunction Act, 28 U.S.C. § 1341, (TIA or the "Act") and related principles of comity. Second, the district court held that even if the suit were not barred, Plaintiffs lack standing to challenge North Carolina's taxation scheme because they lack an injury in fact and because the injury they claim cannot be redressed by the relief they seek. Third, the district court held that even if Plaintiffs did have standing, their amended complaint failed to state a claim upon which

relief could be granted. In so holding, the district court concluded that the 2006 Amendments provide no subsidy to cable operators and therefore do not discriminate against interstate commerce. Plaintiffs now appeal. We review *de novo* the district court's dismissal of Plaintiffs' amended complaint. *Palmer v. City Nat. Bank of W. Virginia*, 498 F.3d 236, 244 (4th Cir. 2007).

III

A.

The Supreme Court long ago "recognized the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems." *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 102 (1981). As the Court has explained:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.

Dows v. City of Chicago, 78 U.S. (11 Wall.) 108, 110 (1871). Accordingly, the Court has articulated a principle of comity that reflects the "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts," requiring federal courts, when the comity principle applies, to deny relief in challenges to state tax laws "in every case where the asserted federal right may be preserved without it." *Fair Assessment*, 454 U.S. at 108 (internal quotation and citation omitted).

This comity principle found legislative voice in the enactment of the Tax Injunction Act, which provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy

may be had in the courts of such State." 28 U.S.C. § 1341. But while the TIA reflects the antecedent comity principle, the principle itself is broader than the Act and "was not restricted by its passage." *Fair Assessment*, 454 U.S. at 110. Indeed, the Supreme Court has continued to apply it in tax cases, *see, e.g.*, *id.* at 116; *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), as well as in other contexts. *See, e.g.*, *Younger v. Harris*, 401 U.S. 37 (1971) (holding that comity principles prohibit federal courts from enjoining pending state criminal prosecutions except in extraordinary circumstances).

In *Fair Assessment*, the Supreme Court addressed the applicability of the comity principle to suits bringing constitutional challenges to state tax laws under 42 U.S.C. § 1983. The Court acknowledged that § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343, authorize "immediate resort to a federal court whenever state actions allegedly infringe[ ] constitutional rights." 454 U.S. at 104 (citing *Monroe v. Pape*, 365 U.S. 167 (1961)). Nevertheless, the Court explained that § 1983 actions challenging state tax laws are inherently intrusive, threatening to disrupt state tax collection and to chill even good-faith actions of state officials. *Id.* at 114-15. Therefore, the Court held that "taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts" so long as "plain, adequate, and complete" remedies are available in the state courts. *Id.* at 116. It is clear that this holding applies to claims for both legal and equitable relief under § 1983. *See id.*; *Great Lakes*, 319 U.S. 293; *Lawyer v. Hilton Head Pub. Serv. Dist. No. 1*, 220 F.3d 298, 302 (4th Cir. 2000).

B.

In applying these principles to this case, we begin our analysis with the relief sought by Plaintiffs. In their prayer for relief, Plaintiffs ask the district court to "declare that Sections 8 through 15 of the 2006 Amendments violate the Commerce Clause of Article I and Article VI of the United States Constitution." J.A. 130. As explained above, these sections repealed the system of local franchise taxation previously in place in North Carolina, repealed the tax credit formerly available to cable providers, and provide for the distribution of part of the proceeds of the state sales tax to local governments in lieu of the franchise taxes those governments collected previously. Accord-

ingly, the relief requested in Plaintiffs' amended complaint would have the effect of restoring the system of local franchise taxation coupled with state-level tax credits to cable providers that existed prior to the enactment of the 2006 Amendments.

On appeal, Plaintiffs contend that they never meant to ask for a declaration that section 9 of the 2006 Amendments — the provision restoring the tax credit to cable providers that Plaintiffs claimed was unconstitutional in their original complaint — is unconstitutional. They characterize the inclusion of section 9 in their prayer for relief as "inadvertent" and urge us to "construe the[ir] complaint liberally" to effectively eliminate this request. Notably, although Plaintiffs intimate that the district court erred in not affording them an opportunity to amend, the record reflects that Plaintiffs themselves made no motion to do so in the district court.

We need not resolve the matter, however, because we conclude that even if we ignore Plaintiffs' request to restore the tax credit to cable providers, principles of comity nevertheless preclude the federal courts from entertaining Plaintiffs' suit. Plaintiffs admit that they seek "an order declaring that the provisions in the 2006 Amendments repealing local government authority to charge franchise fees be declared unconstitutional." Brief of Appellants at 25-26. As Plaintiffs explain, such an order "would restore the power of local governments to determine, in their own discretion, whether or not to charge such fees for the benefits they confer on cable systems." *Id.* at 26. In essence, Plaintiffs ask us to mandate the reinstatement of local franchise taxing authority, a prerogative that North Carolina's General Assembly has seen fit to reserve to itself. It is just this sort of heavy-handed federal court interference in state taxation that the principle of comity is intended to avoid.

Plaintiffs, however, contend that tax comity considerations do not apply to their requested relief because franchise taxes are really not taxes at all, but instead are "rent" or "fees" paid to local governments for the use of public rights-of-way. Thus, we turn our analysis to the nature of the franchise charges at issue here.

Because the principle of comity reflects the recognition that states should be free from federal interference in the administration of their

fiscal operations, we interpret the term "tax" broadly for purposes of our jurisdictional inquiry. *See Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000). We have previously considered the factors a court should consider in determining whether a government-imposed charge constitutes a "tax" or a "fee":

> The "classic tax" is imposed by the legislature upon a large segment of society, and is spent to benefit the community at large. The "classic fee" is imposed by an administrative agency upon only those persons, or entities, subject to its regulation for regulatory purposes, or to raise "money placed in a special fund to defray the agency's regulation-related expenses."

Id. (internal citations omitted). Accordingly, we consider three factors: (1) what entity imposes the charge; (2) what population is subject to the charge; and (3) what purposes are served by the use of the monies obtained by the charge.[1] *Id.* When this inquiry places the charge somewhere between the "classic tax" and the "classic fee," it is the purpose behind the statute that imposes the charge, as reflected in the ultimate use of its proceeds, that is the most important factor. *Id.*

We conclude that — at least for purposes of our comity analysis — the charges levied on cable providers by North Carolina's political subdivisions prior to the 2006 Amendments were taxes. These charges were imposed not by an administrative or regulatory agency, but by North Carolina's political subdivisions with the authorization of the General Assembly. *See* N.C. Gen. Stat. §§ 153A-154, 160A-214 (West 2005). Franchise charges are also spread among a wide proportion of the population, because cable providers are authorized by statute to pass along the costs of franchise charges to their customers. 47 U.S.C. § 542(c); *see also Valero*, 205 F.3d at 134 (noting passing of waste disposal charges from users of landfills to generators of

[1]We note that while the North Carolina statutes authorizing localities to charge for franchises refer to these charges as "taxes," *see* N.C. Gen. Stat. §§ 153A-154, 160A-214 (West 2005), this consideration is not dispositive. *See Valero*, 205 F.3d at 134 (focus is on factual circumstances surrounding the charge, not the nomenclature used).

the waste weighed in favor of finding those charges to be taxes). In addition, the only evidence in the record demonstrates that the proceeds of franchise charges go into the general operating funds of the localities that levy them, rather than into discrete funds established for the maintenance of public rights-of-way.[2] J.A. 150-61. Moreover, we note that the fact that the 2006 Amendments replaced franchise taxes with a state-level tax also supports the conclusion that North Carolina's franchise charges are taxes, not fees.[3]

C.

Having concluded that the franchise charges at issue here are taxes, we also conclude that the relief sought by Plaintiffs is of the very sort that comity principles prevent federal courts from granting. In this regard, we find the First Circuit's decision in *United States Brewers*

[2]Plaintiffs argue that we should permit this case to move to the evidentiary stage because the factual record concerning the purpose and use of the franchise taxes levied by localities is underdeveloped. The problem with this approach is that it permits the very evil that the comity principle is intended to avoid: intrusive federal litigation that threatens to compromise state tax systems. For purposes of our broad construction of "tax" in the context of comity, the record before us is sufficient.

[3]We find the cases cited by Plaintiff to the contrary — none of which involved comity considerations — to be unpersuasive. *City of Dallas v. FCC*, 118 F.3d 393 (5th Cir. 1997), did not analyze any of the factors discussed in *Valero*, but rather likened franchise charges to fees because cable providers receive something in exchange for them: the right to use public rights-of-way. *See id.* at 397-98. Taxpayers, however, often receive something of value in exchange for their taxes — such as access to landfills as in *Valero* — and therefore we find that this singular consideration is not dispositive. *City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893), involved a five-dollar-per-pole charge levied by St. Louis on telegraph companies for the use of the city's telegraph poles. In determining that this charge was rent, as opposed to a tax, the Supreme Court relied on the fact that the charge was not "graduated by the amount of the business, nor is it a sum fixed for the privilege of doing business," and expressly distinguished city taxes levied on the gross income of telegraph companies. *Id.* at 97. By contrast, the franchise charges at issue here are tied to the gross receipts of cable providers and are charged for the privilege of obtaining a franchise.

Ass'n, Inc. v. Perez, 592 F.2d 1212 (1st Cir. 1979), to be instructive. In *Perez*, mainland beer producers sought an injunction to prevent Puerto Rico from collecting an increase in the internal revenue tax on beer or, in the alternative, to enjoin Puerto Rico from granting an exception to the tax to beer producers whose total production did not exceed 31,000,000 wine gallons. *Id.* at 1213. In effect, the alternative relief sought by the plaintiffs in *Perez* would have required Puerto Rico to collect a tax its legislature had declined to impose. Relying on comity principles, the First Circuit held that the case must be dismissed:

> [A]n order of a federal court requiring [Puerto Rico] officials to collect taxes which its legislature has not seen fit to impose on its citizens strikes us as a particularly inappropriate involvement in the state's management of its fiscal operations. This is neither a case in which a court orders reluctant state officials to collect taxes authorized by the citizens of the state, nor one in which officials have failed to perform their "special responsibility" to levy taxes for a crucial public purpose and consequently have violated federal constitutional rights. As appellees point out, the invalidation of the [tax] exemption . . . is an awkward and heavy-handed remedy, producing a broad taxing statute for which [Puerto Rico] may have believed there was no need or which was actually detrimental to its domestic policy. Sound equity practice and a concern for interests of federalism thus bar both the injunctive and declaratory relief sought by appellants.

Id. at 1215 (internal citations omitted).

We conclude that principles of comity apply with even more force to the relief Plaintiffs seek here. While the relief sought in *Perez* would have required Puerto Rico not to enforce a single tax exemption, what Plaintiffs ask for here is a federal court-ordered redistribution of intra-state taxation authority. This relief would be heavy-handed indeed, and would be a particularly inappropriate intrusion by the federal courts into North Carolina's tax laws.

Relying on a footnote in *Hibbs v. Winn*, 542 U.S. 88 (2004), a case interpreting the TIA, Plaintiffs argue that their suit is not barred by

principles of comity because those principles "do[ ] not apply to taxpayer suits that do not disrupt state tax collection." Brief of Appellants at 28. In *Hibbs*, Arizona taxpayers brought an Establishment Clause challenge to certain income tax credits available to those who made contributions to nonprofit organizations that provided scholarship grants to children attending private schools, including religious schools. The Supreme Court held that the TIA did not bar the suit because (1) the plaintiffs did not contest their own tax liability and (2) the relief they sought would not impede Arizona's collection of tax revenue. *Hibbs*, 542 U.S. at 93. Explaining its prior tax comity cases, the Court stated that it "has relied on 'principles of comity' to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection." *Id.* at 107 n.9 (citing *Fair Assessment*, 454 U.S. 100; *Great Lakes*, 319 U.S. 293).

We do not read this footnote as limiting the comity principle in the way Plaintiffs suggest. As the Court of Appeals for the Tenth Circuit has observed, *Hibbs*' characterization of prior tax cases was intended to underscore the unusual claim before the Court in *Hibbs*, not to disavow those earlier holdings. *See Hill v. Kemp*, 478 F.3d 1236, 1249 & n.11 (10th Cir. 2007) (citing *Valero*, 205 F.3d 130).

Furthermore, in discussing the scope of the TIA, the *Hibbs* Court explained that Congress's particular concern in enacting § 1341 was to prevent plaintiffs from challenging their own state tax liabilities in federal court. 542 U.S. at 108-09. Thus, "[t]here was no articulated concern about federal courts' flogging state and local governments to collect additional taxes" animating the TIA itself. *Id.* at 109 (internal quotation and citation omitted). As we have already explained, however, the comity principle underlying the TIA is broader than the Act itself, and its scope is not restricted by § 1341. *See Fair Assessment*, 454 U.S. at 110. Thus, nothing in the Supreme Court's conclusion that *§ 1341* was motivated by the specter of federal court challenges to state tax liabilities suggests that broader *comity* principles would not bar suits attempting to force state tax collection, to say nothing of suits seeking federal court-ordered reallocation of taxation authority

between a state and its political subdivisions.[4] The question was simply not before the Supreme Court in *Hibbs*.[5]

D.

The final question we must address is whether Plaintiffs have a "plain, adequate, and complete" remedy available for the constitutional violations they allege in North Carolina's courts. We have no difficultly concluding that they do, and Plaintiffs do not argue otherwise. Plaintiffs have already challenged an earlier version of North Carolina's taxation scheme in state court, *see DIRECTV, Inc. v. State*, 632 S.E.2d 543 (N.C. Ct. App. 2006), and they are free to do so again, with ultimate appeal to the Supreme Court of the United States.[6]

IV

We hold that principles of comity prevent the federal courts from ordering North Carolina to restore taxing authority to its political subdivisions that it has seen fit to revoke. Plaintiffs thus may not maintain their challenge under § 1983 in the federal courts while the courts of North Carolina remain available to hear it. We therefore affirm the order of the district court dismissing Plaintiffs' amended complaint.[7]

AFFIRMED

---

[4]In light of our conclusion that comity precludes us from mandating reinstatement of local franchise taxing authority in North Carolina, and therefore bars Plaintiffs' suit, we need not address Defendant's argument that suits seeking federal court-ordered redistribution of state tax revenue are likewise barred.

[5]Indeed, the *Hibbs* Court fully understood the First Circuit's holding in *Perez*. In distinguishing *Perez* from the case before it in *Hibbs*, the Court merely observed that *Perez* was not a TIA case and therefore could not support the argument that the TIA barred suits aimed at forcing state collection of taxes. *Hibbs*, 542 U.S. at 109 n.11.

[6]Indeed, this is the way that *West Lynn*, the case primarily relied on by Plaintiffs in their Dormant Commerce Clause argument, reached the Supreme Court. 512 U.S. at 192; *see also Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (Dormant Commerce Clause challenge to Hawaii liquor tax proceeded through Hawaii courts).

[7]In light of our disposition, we need not consider the other bases for the district court's dismissal.

SUPREME CT. OF OHIO

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *DIRECTV, Inc. v. Levin*, Slip Opinion No. 2010-Ohio-6279.]

SLIP OPINION NO. 2010-OHIO-6279

DIRECTV, INC. ET AL., APPELLANTS, *v.* LEVIN, TAX COMMR., APPELLEE.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *DIRECTV, Inc. v. Levin*, Slip Opinion No. 2010-Ohio-6279.]

Taxation — Sales tax — R.C. 5739.01(B)(3)(p) — Satellite-broadcasting services — Taxation of sales of satellite-broadcasting services but not of cable-broadcasting services does not violate Commerce Clause of United States Constitution — Differential tax treatment of two categories of companies is constitutional when difference results solely from nature of business and not from location of companies' activities.

(No. 2009-0627 — Submitted October 13, 2010 — Decided December 27, 2010.)

APPEAL from the Court of Appeals for Franklin County, No. 08AP-32, 181 Ohio App.3d 92, 2009-Ohio-636.

---

1. The Commerce Clause of the United States Constitution protects the interstate market, not particular interstate firms or particular structures or methods of operation in a retail market. (*Exxon Corp. v. Gov. of Maryland* (1978), 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91, followed.)

2. The imposition of a sales tax by the Ohio General Assembly on satellite broadcasting services but not on cable broadcasting services does not violate the Commerce Clause of the United States Constitution, because the tax is based on differences between the nature of those businesses, not the location of their activities, and it does not favor in-state interests at the expense of out-of-state interests. (*Kentucky Dept. of Revenue v. Davis* (2008), 553 U.S. 328, 128 S.Ct. 1801, 170 L.Ed.2d 685; *Amerada Hess Corp. v. Dir., Div. of Taxation, New Jersey Dept. of Treasury* (1989), 490 U.S. 66, 109 S.Ct. 1617, 104 L.Ed.2d 58; and *DIRECTV, Inc. v. Treesh* (C.A.6, 2007), 487 F.3d 471, followed.)

O'DONNELL, J.

{¶ 1} DIRECTV, Inc., and EchoStar Satellite, L.L.C. ("the satellite companies") appeal from a decision of the Tenth District Court of Appeals and ask us to consider whether the imposition of a sales tax on the retail sale of satellite broadcasting services without also imposing the same tax on cable broadcasting services violates the Commerce Clause of the United States Constitution. As other jurisdictions that have considered this same issue have done, we conclude that the Commerce Clause protects the interstate market, not particular interstate firms or particular structures or methods of operation in a retail market. The imposition of a sales tax by the Ohio General Assembly on satellite broadcasting services but not on cable broadcasting services does not violate the Commerce Clause of the United States Constitution, because the tax is based on differences between the nature of those businesses, not the location of their activities, and it does not favor in-state interests at the expense of out-of-state interests. Accordingly, the judgment of the court of appeals is affirmed.

Factual History

Satellite and Cable Broadcasting Services

{¶ 2} The satellite companies provide pay-television programming services to consumers in Ohio and other states using satellites in fixed orbits above the earth. The satellite companies purchase signals for this programming from local broadcast stations, broadcast television networks (ABC, CBS, Fox, and NBC), and providers of cable programming (such as CNN, ESPN, and HBO). They then transmit these signals from uplinks located outside of Ohio to the satellites, which in turn send the signal directly to small satellite dish antennas mounted on or near the home of the subscriber to be received by a decoder box and displayed on the subscriber's television. Other than the antenna and receiver at the subscriber's home, this method of delivery does not require the use of additional ground-receiving and/or distribution facilities in Ohio.

{¶ 3} In the pay-television market, the satellite companies – neither of which is headquartered in Ohio – compete with cable companies, which use ground receiving and distribution facilities to provide television programming to customers. For cable television distribution, the process begins at the "headend," a facility, usually located in or near the franchise area, that contains the collection of antennas that the cable television provider uses to gather programming from local, in-state, and out-of-state sources. However, with cable company consolidation and technological advances, there has been a reduction in the number of headends, and some cable companies use headends located out of state. From the headend, coaxial or fiber-optic cables and amplifiers located either on utility poles or below the ground carry the signal to "hubs" servicing areas of 10,000 to 20,000 customers, which then direct the signal through feeder lines to "nodes" serving particular neighborhoods.

{¶ 4} These cables run along public right of ways, and cable companies enter franchise agreements with local governments and pay a franchise fee to secure this right of access. The franchise fee may vary by locality, but federal law prohibits the fee from exceeding five percent of gross revenues. While the cable

companies' mode of distribution necessitates a local footprint, none of the major cable companies operating in Ohio are headquartered in Ohio, and all serve an interstate market.

The Sales Tax on Satellite Broadcasting Service

{¶ 5} Prior to 2003, Ohio did not tax sales of cable or satellite television service. That year, however, the General Assembly considered a bill that would have taxed sales of both services equally. H.B. No. 95, as introduced in the 125th General Assembly, proposed to enact R.C. 5739.01(B)(3)(q) to define "sale" as including "transactions by which * * * [c]able and satellite television service is or is to be provided." As a result, the cable and satellite television industries retained lobbyists to protect their interests, and ultimately the legislature amended the bill to enact a sales tax on "satellite broadcasting service" alone. See R.C. 5739.01(B)(3)(p) (150 Ohio Laws, Part I, 396, and Part II, 1996). The General Assembly's definition of "satellite broadcasting service" in R.C. 5739.01(XX) does not include transactions involving the distribution of pay-television programming using ground receiving or distribution equipment, and the sale of cable television programming is therefore not subject to the tax.

Procedural History

{¶ 6} In response to this legislation, the satellite companies filed a declaratory-judgment complaint in the Franklin County Common Pleas Court seeking a declaration that the tax on sales of satellite television service but not on sales of cable television service had both the purpose and effect of favoring in-state economic interests in violation of the Commerce Clause.

{¶ 7} The trial court entered a partial summary judgment in favor of the satellite companies, declaring the sales tax on satellite broadcasting services to be unconstitutional because "[t]he differential tax treatment of [satellite and cable television providers] is directly correlated with whether they use certain *local* ground receiving and distribution equipment. * * * [T]he practical effect of the

differential tax treatment is to benefit in-state economic interests while burdening out-of-state economic interests, thereby discriminating against interstate commerce in violation of the Commerce Clause* * *." (Emphasis sic.)

{¶ 8} The trial court also concluded that a genuine issue of material fact existed regarding whether the General Assembly had intentionally discriminated against interstate commerce in levying the tax, and the court denied summary judgment on that issue. However, the court rejected the satellite companies' argument that the sales tax facially discriminated against interstate commerce, a position the satellite companies have since abandoned.

{¶ 9} The tax commissioner appealed, and the Tenth District Court of Appeals reversed the judgment of the trial court and held that the Commerce Clause is not violated when the differential tax treatment of two categories of companies results solely from differences between the nature of their businesses, not from the location of their activities. *DIRECTV v. Levin*, 181 Ohio App.3d 92, 2009-Ohio-636, 907 N.E.2d 1242. The court explained that because both of these providers are engaged in interstate commerce, the sales tax did not discriminate against the interstate market for pay television, but merely against one interstate company competing in that market. Id. at ¶ 27–28. The appellate court further determined that the trial court erred in denying the tax commissioner's motion for summary judgment on the issue of whether there was purposeful discrimination and directed the trial court to enter summary judgment for the tax commissioner on all claims. Id. at ¶ 35.

{¶ 10} We accepted the satellite companies' discretionary appeal. *DIRECTV, Inc. v. Levin*, 122 Ohio St.3d 1454, 2009-Ohio-3131, 908 N.E.2d 945.

Arguments on Appeal

{¶ 11} The satellite companies urge that the sales tax imposed by R.C. 5739.01(B)(3)(p) discriminates against interstate commerce in practice because the tax gives preferential treatment to "cable TV companies [that] have invested a

fortune in building and maintaining a network of 'ground receiving or distribution equipment' – including thousands of buildings and tens of thousands of miles of cable – in Ohio," while satellite service is taxed "because its providers have devised a way to deliver the same service without installing any 'ground or receiving or distribution equipment' in Ohio." According to the satellite companies, a state may not distinguish between companies engaged in interstate commerce if the distinction turns on the extent of economic investment in the state, notwithstanding any differences in the manner in which the firms conduct business. Thus, they maintain that any discrimination in tax treatment that depends on the existence of ground receiving or distributing equipment in Ohio is unconstitutional.

{¶ 12} The satellite companies also assert that the court of appeals left undisturbed the trial court's conclusion that a genuine issue of material fact remains regarding whether the General Assembly intentionally discriminated against them in enacting R.C. 5739.01(B)(3)(p), and they argue that statements made by lobbyists for the cable industry to legislators regarding the statute's purpose and effect are relevant and admissible in proving discrimination against interstate commerce.

{¶ 13} The tax commissioner responds that the tax "simply differentiates between two forms of interstate commerce, not between a local economic activity and an out-of-state economic activity." Tax differentials, he asserts, are not "prohibited simply because the business adversely affected by the tax treatment generates less economic activity in the subject state than the business that received favorable tax treatment." The tax commissioner maintains that even if the tax technically discriminates against commerce, the sales tax may be "properly sustained as 'compensatory' or 'complementary' " to the franchise fees imposed on cable companies. Also, he contends that the satellite companies have abandoned the issue of intentional discrimination.

{¶ 14} Accordingly, we are called upon to consider whether the sales tax levied by R.C. 5739.01(B)(3)(p) on satellite broadcasting services but not on cable broadcasting services discriminates against interstate commerce in violation of the Commerce Clause.

Law and Analysis

Standard of Review

{¶ 15} At the outset, we note that our review of a summary judgment is de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. "Summary judgment is appropriate if (1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 2005-Ohio-2163, 826 N.E.2d 832, ¶ 9.

{¶ 16} In determining whether a law discriminates against interstate commerce, the United States Supreme Court has "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects." *W. Lynn Creamery, Inc. v. Healy* (1994), 512 U.S. 186, 201, 114 S.Ct. 2205, 129 L.Ed.2d 157. Further, as the court explained in *Hughes v. Oklahoma* (1979), 441 U.S. 322, 336, 99 S.Ct. 1727, 60 L.Ed.2d 250, "[t]he burden to show discrimination rests on the party challenging the validity of the statute" – in this case, the satellite companies.

The Dormant Commerce Clause

{¶ 17} The United States Constitution provides that Congress shall have the power "[t]o regulate Commerce * * * among the several States." Clause 3, Section 8, Article I. However, although the terms of the Commerce Clause "do not expressly restrain 'the several States' in any way," the Supreme Court has "sensed a negative implication in the provision since the early days." *Kentucky*

Dept. of Revenue v. Davis (2008), 553 U.S. 328, 337, 128 S Ct. 1801, 170 L.Ed.2d 685. Thus, the court has "long interpreted the Commerce Clause as an implicit restraint on state authority." *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Mgt. Auth.* (2007), 550 U.S. 330, 338, 127 S.Ct. 1786, 167 L.Ed.2d 655. This concept of "negative implication" and "implicit restraint" is known as the "negative" or "dormant" Commerce Clause.

{¶ 18} The doctrine of the dormant Commerce Clause traces its roots back to "[t]he desire of the Forefathers to federalize regulation of foreign and interstate commerce." *H.P. Hood & Sons, Inc. v. Du Mond* (1949), 336 U.S. 525, 533, 69 S.Ct. 657, 93 L.Ed. 865. As the court explained in *Camps Newfound/Owatonna, Inc. v. Harrison* (1997), 520 U.S. 564, 571, 117 S.Ct. 1590, 137 L.Ed.2d 852, "During the first years of our history as an independent confederation, the National Government lacked the power to regulate commerce among the States. Because each State was free to adopt measures fostering its own local interests without regard to possible prejudice to nonresidents, what Justice Johnson characterized as a 'conflict of commercial regulations, destructive to the harmony of the States,' ensued." Id., quoting *Gibbons v. Ogden* (1824), 22 U.S. (9 Wheat.) 1, 224, 6 L.Ed. 23 (Johnson, J., concurring).

{¶ 19} Accordingly, the modern cases arising under what has become known as the dormant Commerce Clause are "driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.' " *Kentucky Dept. of Revenue*, 553 U.S. at 337–338, quoting *New Energy Co. of Indiana v. Limbach* (1988), 486 U.S. 269, 273–274, 108 S.Ct. 1803, 100 L.Ed.2d 302. The dormant Commerce Clause thus enshrines the economic policy of the framers to prohibit states from erecting barriers to free trade across state borders and from enacting laws that favor local enterprises at the expense of out-of-state businesses. *Boston Stock*

Exchange v. New York State Tax Comm. (1977), 429 U.S. 318, 328-329, 97 S.Ct. 599, 50 L.Ed.2d 514.

{¶ 20} The Supreme Court has therefore recognized that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce * * * by providing a direct commercial advantage to local business.' " (Ellipsis sic.) Id. at 329, quoting *Northwestern States Portland Cement Co. v. Minnesota* (1959), 358 U.S. 450, 458, 79 S.Ct. 357, 3 L.Ed.2d 421.

{¶ 21} The court has pointed out, however, that the Commerce Clause of the United States Constitution "protects the interstate market, not particular interstate firms" or "particular structure[s] or methods of operation in a retail market." *Exxon Corp. v. Gov. of Maryland* (1978), 437 U.S. 117, 127, 98 S.Ct. 2207, 57 L.Ed.2d 91. Therefore, differential tax treatment of "two categories of companies result[ing] solely from differences between the nature of their businesses, [and] not from the location of their activities," does not violate the dormant Commerce Clause. *Amerada Hess Corp. v. Dir., Div. of Taxation, New Jersey Dept. of the Treasury* (1989), 490 U.S. 66, 78, 109 S.Ct. 1617, 104 L.Ed.2d 58.

{¶ 22} Relying on the decisions of the United States Supreme Court in *Exxon* and *Amerada Hess*, every state and federal court considering Commerce Clause challenges brought by the satellite industry arguing against state tax measures as favoring the cable industry has held that these taxes do not violate the dormant Commerce Clause because they do not discriminate against interstate commerce.

{¶ 23} In *DIRECTV, Inc. v. Treesh* (E.D.Ky.2006), 469 F.Supp.2d 425, the court considered a Kentucky tax statute that imposed a sales tax on both satellite and cable services, but prohibited local governments from imposing franchise fees on cable companies while allowing cable companies a tax credit for the amount of any such fee imposed. The satellite companies claimed that

allowing cable companies free access to public right-of-ways to install infrastructure within the state of Kentucky gave them a tax advantage not shared with satellite companies, whose service is provided through satellites located outside the state of Kentucky.

{¶ 24} The district court dismissed the complaint, finding that the tax did not distinguish between in-state and out-of-state economic interests and had neither discriminatory purpose nor effect. The court noted that the cable companies could not be characterized as in-state interests and that "[t]he different effects of Kentucky's new tax provisions on Satellite Companies and Cable Companies are owed not to the geographic location of the companies, but to their different delivery mechanisms," explaining that the tax statute had the same effect regardless of whether the satellite or cable companies located their operations inside or outside the state. Id. at 437-438.

{¶ 25} The Sixth Circuit Court of Appeals affirmed and noted: "While *a* purpose of the [Kentucky tax statute] might have been to aid the cable industry rather than the satellite industry because the former has a larger in-state presence than the latter, there were clearly *many other* purposes including assessing some tax against a satellite industry that is rapidly growing * * *." (Emphasis sic.) *DIRECTV v. Treesh* (C.A.6., 2007), 487 F.3d 471, 480.

{¶ 26} The court went on to recognize that (1) cable and satellite companies provide consumers with two distinct goods, "consisting of two very different means of delivering broadcasts," id. at 480, (2) "the dormant Commerce Clause is intended to protect interstate commerce, and not particular firms engaged in interstate commerce, or the modes of operation used by those firms," id. at 481, and (3) "differential tax treatment of 'two categories of companies result[ing] solely from differences between the nature of their businesses, [and] not from the location of their activities' does not violate the dormant Commerce Clause." Id., quoting *Amerada Hess*, 490 U.S. at 78. The

Sixth Circuit emphasized that "applying the dormant Commerce Clause in cases that do not present the equivalent of a protective tariff" — i.e., where the tax does not draw geographic lines, favor local products, or promote local companies — would "dramatically increase the clause's scope." 487 F.3d at 481. The Supreme Court of the United States denied a writ of certiorari. See *DIRECTV, Inc. v. Treesh* (2008), 552 U.S. 1311, 128 S.Ct. 1876, 170 L.Ed.2d 746.

{¶ 27} In addition, the satellite companies challenged a North Carolina statute that imposed a sales tax on "direct-to-home satellite service" but not on cable television service. The North Carolina Court of Appeals rejected the Commerce Clause challenge, explaining that the tax "does not make any geographical distinctions, but merely describes one method of providing television programming services to North Carolina subscribers." *DIRECTV, Inc. v. State* (2006), 178 N.C.App. 659, 663, 632 S.E.2d 543. Moreover, the tax "does not discriminate against [the satellite companies] in favor of a local industry [because] cable companies are no more 'local' in nature than are satellite companies." Id. at 664. See also *DIRECTV, Inc. v. Tolson* (E.D.N.C.2007), 498 F.Supp.2d 784, 800, affirmed (C.A.4, 2008), 513 F.3d 119 (dismissing the satellite companies' complaint on other grounds, but explaining that the amended North Carolina statute imposing an equal tax on satellite and cable companies while revoking authority of local government to impose franchise fees does not violate the Commerce Clause).

The Ohio Sales Tax

{¶ 28} R.C. 5739.02 imposes a tax "on each retail sale made in this state." R.C. 5739.01(B)(3)(p) defines "sale" to include "transactions for a consideration in any manner" by which "satellite broadcasting service is or is to be provided." R.C. 5739.01(XX) further defines "satellite broadcasting service" to mean "the distribution or broadcasting of programming or services by satellite directly to the subscriber's receiving equipment *without the use of ground receiving or*

distribution equipment, except the subscriber's receiving equipment or equipment used in the uplink process to the satellite." (Emphasis added.) As the parties agree, the phrase "without the use of ground receiving or distribution equipment" clarifies that sales of cable broadcasting services are not subject to the tax.

{¶ 29} In reviewing the application of this statute to the facts here, we conclude that the sales tax imposed on satellite broadcasting services but not cable broadcasting services does not violate the Commerce Clause of the United States Constitution. The statute's application depends on the technological mode of operation, not geographic location, and while it distinguishes between different types of interstate firms, it does not favor in-state interests at the expense of out-of-state enterprises. See *DIRECTV*, 487 F.3d at 480-481; *DIRECTV*, 469 F.Supp.2d at 437-438; *DIRECTV*, 498 F.Supp.2d at 800; *DIRECTV*, 178 N.C.App. at 663.

{¶ 30} Here, the tax applies to a transaction involving pay-television services depending only on the technological mode of distribution of those services. The General Assembly used the phrase "ground receiving or distribution equipment" in R.C. 5739.01(XX) to track the definition of "direct-to-home satellite service" set forth in the notes to Section 152, Title 47, U.S.Code, which authorize states to tax satellite-television service. See Pub.L. No. 104-104, Title VI, Section 602(b)(1), 110 Stat. 144 (1996). The General Assembly defined "satellite broadcasting service" to correspond with this federal authorization and to identify the taxable transaction by the method of distributing pay-television services, not to protect companies that have invested in a ground distribution system or to encourage investment in such a system.

{¶ 31} Application of the sales tax does not depend on the geographic location of the programming provider. Rather, the sale of satellite broadcasting services is subject to tax regardless of whether the provider is an in-state or out-of-state business and without consideration of the amount of local economic

activity or investment in facilities that the satellite companies bring to Ohio. A satellite company that is headquartered in Ohio, builds its uplink in Ohio, employs only Ohio residents, and provides programming only to Ohio customers is equally responsible for collecting the tax as any out-of-state company providing the same services using the same mode of distribution.

{¶ 32} Conversely, the cable industry is not a local interest benefited at the expense of out-of-state competitors. Like the satellite companies, the major cable providers are interstate companies selling an interstate product to an interstate market. Both the satellite and cable industries serve customers in Ohio, own property in Ohio, and employ residents of Ohio, but no major pay-television provider is headquartered in Ohio or could otherwise be considered more local than any other. Thus, the sales tax does not reflect "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Oregon Dept. of Environmental Quality* (1994), 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13. Rather, the tax regulates among these interests even-handedly based on the technological mode of operation.

{¶ 33} The cases on which the satellite companies rely are distinguishable. In *Granholm v. Heald* (2005), 544 U.S. 460, 125 S.Ct. 1885, 161 L.Ed.2d 796, the states of Michigan and New York imposed regulations allowing in-state, but not out-of-state, wineries to make direct sales to customers, while in *Bacchus Imports, Ltd. v. Dias* (1984), 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200, the state of Hawaii excepted certain alcoholic beverages using locally produced ingredients from the state liquor tax. In *Armco Inc. v. Hardesty* (1984), 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540, the state of West Virginia imposed a wholesale tax on goods manufactured out-of-state but not on goods made in state, and in *Westinghouse Elec. Corp. v. Tully* (1984), 466 U.S. 388, 390, 104 S.Ct. 1856, 80 L.Ed.2d 388, the state of New York gave a tax credit only to those

corporations whose subsidiaries exported goods from New York. And in *Boston Stock Exchange*, 429 U.S. at 328-329, the state imposed a greater tax liability on out-of-state transactions than on in-state transactions.

{¶ 34} In those cases, the respective states acted to protect local interests at the expense of out-of-state competitors. In sharp contrast, the Ohio tax does not protect local industries or treat in-state companies any differently from out-of-state companies, nor does it provide a tax incentive for companies to move operations or direct business to Ohio.

{¶ 35} Therefore, we concur with those courts that have considered the merits of the satellite companies' dormant Commerce Clause claims and conclude that the Ohio sales tax on satellite broadcasting services does not discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution.

The Admissibility of Lobbyist Statements

{¶ 36} The satellite companies assert that statements made by lobbyists for the cable industry are admissible to prove both the practical effect of the sale tax and the intent of the General Assembly in enacting it. We need not reach the merits of this claim.

{¶ 37} Assuming for purposes of this argument that the statements would be admissible to prove the discriminatory effect of the sales tax, these statements would not affect our conclusion that the sales tax does not discriminate against commerce in practical effect.

{¶ 38} And to the extent that the satellite companies rely on the lobbyist statements to show that the General Assembly passed the sales tax with a discriminatory intent, we are unable to reach that issue because the satellite companies failed to preserve their intentional-discrimination claim for our review. Here, the court of appeals reversed the trial court's decision to deny summary judgment in favor of the tax commissioner on the claim that the state purposefully

discriminated against interstate commerce, ordering "the trial court to enter summary judgment for defendant-appellant Richard A. Levin, Tax Commissioner of Ohio" and ending this litigation subject only to appeal. *DIRECTV*, 181 Ohio App.3d 92, 2009-Ohio-636, 907 N.E.2d 1242, ¶ 6, 29, and 35.

{¶ 39} However, in their memorandum in support of jurisdiction in this court, the satellite companies did not argue that the court of appeals erred by ordering summary judgment for the tax commissioner on this issue. They sought review only of the evidentiary issue regarding whether evidence of lobbyist statements is relevant and admissible. Not only did the satellite companies fail to attack the order directing summary judgment against them in their initial brief filed here, but also they asserted that the appellate court had not actually ruled against them on this point.

{¶ 40} By failing to challenge the decision granting summary judgment in favor of the tax commissioner on the intentional-discrimination claim in either their memorandum in support of jurisdiction or their initial brief, the satellite companies failed to preserve that claim for review. See, e.g., *Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation & Dev. Disabilities*, 102 Ohio St.3d 230, 2004-Ohio-2629, 809 N.E.2d 2, ¶ 18 (declining to consider issues not set forth in the appellant's memorandum in support of jurisdiction); *Utility Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 54 (explaining that the appellant "failed to preserve" an argument "raised for the first time on reply"). Accordingly, we decline to address this issue.

Conclusion

{¶ 41} Differential tax treatment of two categories of companies resulting solely from differences between the nature of their businesses, not from the location of their activities, does not violate the Commerce Clause of the United States Constitution. The Ohio General Assembly imposed a sales tax that makes no distinction between local and interstate commerce, but rather distinguishes

based only on the mode of distributing television programming. For these reasons, the judgment of the court of appeals is affirmed.

Judgment affirmed.

LUNDBERG STRATTON, O'CONNOR, LANZINGER, and CUPP, JJ., concur.

BROWN, C.J., and PFEIFER, J., dissent.

BROWN, C.J., dissenting.

{¶ 42} Cable companies and satellite companies sell the same thing: pay-television service. But in Ohio they are not taxed the same. Satellite companies must collect the 5 1/2 percent sales tax; cable companies do not.

{¶ 43} Why the difference? When the tax bill was introduced, it imposed an equal tax regardless of seller. Cable-television lobbyists stepped in and drew the legislature's attention to certain economic realities: the cable industry directly employs exponentially more Ohioans (6,000) than the satellite industries (a "nominal" number) and pays exponentially more taxes (over $100 million annually) than satellite ("nominal" amounts). According to the cable industry, "the proposed sales tax on cable service penalizes the cable industry for our deep roots in this state and rewards a competing out-of-state industry who profits from Ohioans." That "out-of-state industry" is the satellite industry, which "[p]rovides Ohioans with very few job opportunities," "[d]oesn't pay an appreciable tax of any kind anywhere in Ohio," and "[p]rovides little support to local communities."

{¶ 44} What the cable companies could see, the majority cannot: it is in Ohio's economic interest to support the cable industry's jobs and investment, and relieving the cable industry of the sales tax benefits that interest. I am all in favor of promoting employment and investment in this state, but as I read the law, this particular road is not open to us.

States May Not Impose Discriminatory Taxes to Favor Local Jobs and Investment

{¶ 45} The black-letter rule is clear. The Commerce Clause forbids states to discriminate against interstate commerce, and discrimination " 'simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.' " *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Mgt. Auth.* (2007), 550 U.S. 330, 342, 127 S.Ct. 1786, 167 L.Ed.2d 655, quoting *Oregon Waste Sys., Inc. v. Dept. of Environmental Quality* (1994), 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13.

{¶ 46} States have an economic interest not only in "mom and pop" businesses, but in all forms of local investment. So it ignores economic reality to focus narrowly on the location of ownership or headquarters. While local ownership and headquarters *might* benefit the local economy, the amount of benefit depends on jobs and revenue. And a business need not be locally owned or headquartered to benefit the local economy. For instance, one fairly suspects that the city of Marysville, if forced to choose, would take the Honda plant over any homegrown business, and perhaps any dozen.

{¶ 47} This is common sense, and numerous cases confirm it. Local investment, not simply locally headquartered businesses, may not be promoted through discriminatory taxation. See, e.g., *C & A Carbone, Inc. v. Clarkstown* (1994), 511 U.S. 383, 392, 114 S.Ct. 1677, 128 L.Ed.2d 399 ("Discrimination against interstate commerce in favor of local business *or* investment is *per se* invalid * * *" (emphasis added)); *Lewis v. BT Invest. Managers, Inc.* (1980), 447 U.S. 27, 42, 100 S.Ct. 2009, 64 L.Ed.2d 702 (prohibited "local favoritism or protectionism" includes discrimination among businesses according to the extent of their contacts with the local economy or based on the extent of local operations); *Fulton Corp. v. Faulkner* (1996), 516 U.S. 325, 344, 116 S.Ct. 848, 133 L.Ed.2d 796 ("States may not impose discriminatory taxes on interstate commerce in the hopes of encouraging firms to do business within the State").

{¶ 48} Local investment, of course, includes the creation or preservation of local jobs. The Supreme Court has accordingly found "parochial legislation" to be constitutionally invalid when "the ultimate aim" of the legislation was "to create jobs by keeping industry within the State." *Philadelphia v. New Jersey* (1978), 437 U.S. 617, 627, 98 S.Ct. 2531, 57 L.Ed.2d 475; see also *Baldwin v. G.A.F. Seelig, Inc.* (1935), 294 U.S. 511, 527, 55 S.Ct. 497, 79 L.Ed. 1032 (the power to tax may not be used to establish "an economic barrier against competition with the products of another state or the labor of its residents"); *South-Central Timber Dev., Inc. v. Wunnicke* (1984), 467 U.S. 82, 100, 104 S.Ct. 2237, 81 L.Ed.2d 71 ("the Commerce Clause forbids a State to require work to be done within the State for the purpose of promoting employment").

{¶ 49} Lower federal courts have recognized the same point. See, e.g., *Pelican Chapter, Associated Builders & Contrs., Inc. v. Edwards* (C.A.5, 1997), 128 F.3d 910, 918 ("patent economic protectionism" includes "[r]educing unemployment by discouraging the use of out-of-state labor"); *Louisiana Dairy Stabilization Bd. v. Dairy Fresh Corp.* (C.A.5, 1980), 631 F.2d 67, 70 (the Commerce Clause prevents a state from burdening interstate commerce for the purpose of "preventing local economic disruption"); *Mapco, Inc. v. Grunder* (N.D.Ohio 1979), 470 F.Supp. 401, 412 (Commerce Clause is violated by a differential tax on high- and low-sulfur coal that is intended to "protect and favor the Ohio high-sulfur coal industry (both workers and management)" and prevent "the likely loss of jobs of Ohio coal miners").

{¶ 50} Under these principles, the sales tax is unconstitutional. It treats sellers of the same service differently. That's discrimination. It favors the sellers who invest locally and burdens the sellers who do not. That's favoritism of in-state over out-of-state economic interests. Together, these features place the sales tax well within the prohibition of the dormant Commerce Clause.

The Sixth Circuit Decision in *DIRECTV v. Treesh* Does Not Resolve This Case

{¶ 51} The majority follows the Sixth Circuit's statement in *DIRECTV, Inc. v. Treesh* (C.A.6, 2007), 487 F.3d 471, 481, that "the dormant Commerce Clause is intended to protect interstate commerce, and not particular firms engaged in interstate commerce, or the modes of operation used by those firms." *Treesh* derived this rule from a pair of Supreme Court decisions, *Exxon Corp. v. Gov. of Maryland* (1978), 437 U.S. 117, 127, 98 S.Ct. 2207, 57 L.Ed.2d 91, and *Amerada Hess Corp. v. Dir., Div. of Taxation, New Jersey Dept. of Treasury* (1989), 490 U.S. 66, 109 S.Ct. 1617, 104 L.Ed.2d 58. For several reasons, I am not persuaded that *Treesh* provides the answer to this case.

{¶ 52} First, *Treesh* is not on point. It reviewed a materially different tax structure. Kentucky had imposed an *even-handed* sales tax that treated cable and satellite the same way. There was no discrimination; without discrimination, there is no Commerce Clause claim. *Treesh* boiled down to whether a state *must* charge cable companies for use of rights-of-way, see 487 F.3d at 479, a much different question than the one presented here.

{¶ 53} Nevertheless, it is true that *Treesh* went on to suggest that under *Exxon* and *Amerada Hess,* the Commerce Clause does not prohibit differential taxation of the cable and satellite industries. I disagree that these cases save this tax.

***Exxon* and *Amerada Hess* Do Not Immunize Discriminatory Taxes**

{¶ 54} Neither *Exxon* nor *Amerada Hess* allow discriminatory taxation so long as both sides may be called "interstate firms" or use different "modes of operation." The plaintiffs in those cases lost because the court could discern no differential treatment of in-state and out-of-state interests.

{¶ 55} In *Amerada Hess*, the plaintiff oil companies alleged that the state tax favored independent retailers who do not produce oil over oil producers who

market their own oil. 490 U.S. at 78. But as the court pointed out, nonproducing retailers may operate both in the taxing state and outside it, and the tax treated *all* nonproducing retailers the same. Id. As the plaintiffs failed to identify a discrete, favored *state* interest, *Amerada Hess* characterized the tax difference as resulting "solely from differences between the nature of [competing] businesses." Id. The key word is "solely," a word that cannot be used here.

{¶ 56} Similarly, in *Exxon*, the plaintiff oil companies alleged that the effect of a particular tax was to protect in-state independent dealers from out-of-state competition. 437 U.S. at 125. But as the court pointed out, "there are several major interstate marketers of petroleum that own and operate their own retail gasoline stations," and "in-state independent dealers will have no competitive advantage over out-of-state dealers." Id. at 125–126. Thus, when *Exxon* stated that the Commerce Clause does not protect "the particular structure or methods of operation in a retail market," it had already concluded that the challenged tax was not discriminatory.

{¶ 57} Neither case involved an identifiable in-state, out-of-state line. So these cases stand for the modest proposition that the Commerce Clause permits states to distinguish among differing kinds of businesses, so long as the distinctions do not favor local economic interests. (Such distinctions could be challenged under the generally more lenient Equal Protection Clause.) But operational differences do not *immunize* protectionist discrimination—indeed, *Amerada Hess* and *Exxon* prove the point: despite clear operational differences in each case, the court still looked for location-based discrimination. It simply could not find it.

{¶ 58} "[N]o single conceptual approach identifies all of the factors that may bear on a particular case." *Raymond Motor Transp., Inc. v. Rice* (1978), 434 U.S. 429, 441, 98 S.Ct. 787, 54 L.Ed.2d 664. And more broadly, courts should "think things not words." *United States v. McGuire* (C.A.7, 2010), ___ F.3d ___,

2010 WL 4908001, at *3. However selectively those cases may be quoted, *Exxon* and *Amerada Hess* have little bearing here.

The Sales Tax Creates an Incentive to Invest in Ohio

{¶ 59} The majority also suggests that the sales tax provides no incentive for the satellite companies to locate infrastructure in Ohio. This is not true.

{¶ 60} All other things being equal, the sales tax *does* give incentive to pay-TV companies to distribute signals using in-ground cable instead of satellites. Indeed, if the satellite companies installed an in-ground cable network, they would avoid the sales tax. Of course, given how much they have already invested in a different mode of delivery, that is an impossibly high price to pay.

{¶ 61} Following this point through, if the satellite companies did the unthinkable and installed an in-ground cable network, they would avoid the Ohio sales tax, and they would bring jobs, franchise fees, and property taxes to Ohio. This fact only confirms that favoring cable companies benefits in-state economic interests.

Reversal Would Not Expand the Scope of the Dormant Commerce Clause

{¶ 62} The majority does not address it, but the tax commissioner raises a form of the "floodgates" defense. He says that invalidating the sales tax would "create a nightmare for legislators and the courts to administer as no two interstate players have the same relative economic presence in each state in which they do business," and this presence "could literally change by the moment as one business elects to move its infrastructure around the country."

{¶ 63} The risk of deluge is overstated. This case could not recur without the following elements: (1) a materially identical good or service, (2) two competing industries offering the good or service using distinct methods or modes of delivery, (3) one method making heavy use of the state's land and labor, with the other virtually bypassing the state's economic infrastructure, (4) different tax treatment of the materially identical good or service, (5) favorable treatment of

the local method over the nonlocal, (6) indications in the evolution of the tax that it was motivated by protectionism, and (7) no constitutionally valid explanation for the tax.

{¶ 64} I find it doubtful that such a fact pattern will often recur. The problem of comparing mismatched sets of "interstate players" is answered by the requirement that the favored and disfavored parties be similarly situated. See *Gen. Motors Corp. v. Tracy* (1997), 519 U.S. 278, 117 S.Ct. 811, 136 L.Ed.2d 761. That requirement—which is met here, as cable and satellite unquestionably compete—would head off most problems, including the tellingly short parade of horribles marched out by the tax commissioner. And if this fact pattern did recur, it is unobjectionable that the Commerce Clause would prohibit it.

The Compensatory-Tax Defense Would Not Save This Tax

{¶ 65} The majority does not address the tax commissioner's affirmative defense, but for the sake of completeness, I will. A protectionist tax can be saved if "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Indiana v. Limbach* (1988), 486 U.S. 269, 278, 108 S.Ct. 1803, 100 L.Ed.2d 302. The "standards for such justification are high," however, invoking " 'the strictest scrutiny.' " Id. at 278–279, quoting *Hughes v. Oklahoma* (1979), 441 U.S. 322, 337, 99 S.Ct. 1727, 60 L.Ed.2d 250.

{¶ 66} The commissioner offers only one substantial nondiscriminatory justification: that the sales tax counterbalances the franchise fees that cable companies pay to local governments. This is the "compensatory tax" defense. See, e.g., *Fulton Corp.*, 516 U.S. at 331. Often raised, this defense rarely wins. All of the following cases have rejected it: *S. Cent. Bell Tel. Co. v. Alabama* (1999), 526 U.S. 160, 169–170, 119 S.Ct. 1180, 143 L.Ed.2d 258; *Fulton Corp.*, 516 U.S. at 331–344, 116 S.Ct. 848, 133 L.Ed.2d 796; *Associated Industries of Missouri v. Lohman* (1994), 511 U.S. 641, 648–649, 114 S.Ct. 1815, 128 L.Ed.2d

639; *Oregon Waste Sys.*, 511 U.S. at 104; *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue* (1987), 483 U.S. 232, 244, 107 S.Ct. 2810, 97 L.Ed.2d 199; *Armco Inc. v. Hardesty* (1984), 467 U.S. 638, 642–643, 104 S.Ct. 2620, 81 L.Ed.2d 540; *Maryland v. Louisiana* (1981), 451 U.S. 725, 758, 101 S.Ct. 2114, 68 L.Ed.2d 576; *Boston Stock Exchange v. State Tax Comm.* (1977), 429 U.S. 318, 332, 97 S.Ct. 599, 50 L.Ed.2d 514. In the court's own words, since 1937, it has "shown extreme reluctance to recognize new compensatory categories" beyond the sales-and-use-tax combination. *Fulton Corp.*, 516 U.S. at 338.

{¶ 67} Even assuming that individually negotiated franchise fees in this case constitute "taxes," the compensatory-tax defense does not avail the tax commissioner. First, the sales tax and the franchise fees are not "substantially equivalent," that is, "sufficiently similar in substance to serve as mutually exclusive 'prox[ies]' for each other." *Oregon Waste Sys.*, 511 U.S. at 103, quoting *Armco*, 467 U.S. at 643. For the sales tax, the taxable event is a transaction, the sale of television programming. See, e.g., *Howell Air, Inc. v. Porterfield* (1970), 22 Ohio St.2d 32, 34, 51 O.O.2d 62, 257 N.E.2d 742. Franchise fees are not taxes on the privilege of purchasing, but compensate the local government for the costs incurred in allowing and regulating access to public rights of way.

{¶ 68} The real-world differences between the two industries confirm the legal conclusion that sales taxes and franchise fees cannot be equated. Cable must burden public property to deliver its signals—it must string cable on poles and bury it in the ground. Satellite does not impose these kinds of burdens, so requiring satellite companies to pay their proxy would not make sense.

{¶ 69} But whereas *only* cable engages in the activity that triggers franchise fees, *both* cable and satellite engage in the activity taxed by the sales tax—both sell television programming. Thus, sparing the cable industry the sales

tax does not equalize the tax burden so much as it eliminates a cost advantage held by satellite—the ability to deliver service without using public rights-of-way.

{¶ 70} Finally, even if franchise fees were fairly comparable, the sales tax exceeds the amount of the franchise fee. See *Oregon Waste*, 511 U.S. at 103. The sales tax is currently 5 1/2 percent. R.C. 5739.02(A)(1). Franchise fees are *capped* at five percent of gross receipts. Section 542(b), Title 47, U.S.Code. But some localities have agreed to less. For example, the city of Delaware has charged a fee as low as three percent. And whether through a later reduction of franchise fees or an increase of the sales tax, these disparities could increase.

{¶ 71} In sum, the sales tax treats competing industries differently, effectively (and perhaps intentionally) favoring the industry with extensive local ties over the one with comparatively few. Such a law violates the Commerce Clause. For these reasons, I respectfully dissent and would reverse the judgment of the court of appeals.

PFEIFER, J., concurs in the foregoing opinion.

Orrick, Herrington & Sutcliff, L.L.P., E. Joshua Rosenkranz, and Jeremy N. Kudon; Steptoe & Johnson, L.L.P., Pantelis Michalopoulos, and Mark F. Horning; and Calfee, Halter & Griswold, L.L.P., and Peter A. Rosato, for appellants.

Richard Cordray, Attorney General, and Lawrence D. Pratt, Alan P. Schwepe, Julie E. Brigner, Damion M. Clifford, and Barton A. Hubbard, Assistant Attorneys General, for appellee.

David Parkhurst; and Vorys, Sater, Seymour & Pease, L.L.P., and Robert J. Krummen, urging affirmance for amicus curiae National Governors Association.

Sutherland, Asbill & Brennan, L.L.P., and Eric S. Tresh; Walter Hellerstein; and Vorys, Sater, Seymour & Pease, L.L.P., Douglas R. Matthews,

and Michael J. Hendershot, urging affirmance for amici curiae Time Warner Cable, ComCast, and Cox Communications.

John A. Swain and David C. Crago, urging affirmance for amicus curiae Ohio Cable Telecommunications Association.

Fleischman & Harding, L.L.P., Arthur H. Harding, Craig A. Gilley, and Micah M. Caldwell; and Ulmer & Berne, L.L.P., and Donald J. Mooney Jr., urging affirmance for amicus curiae Institute for Policy Innovation.

Roy Cooper, North Carolina Attorney General, Christopher G. Browning Jr., Solicitor General, Gary R. Govert, Special Deputy Attorney General, and Michael D. Youth, Assistant Attorney General; Mark L. Shurtleff, Utah Attorney General, and Annina M. Mitchell, Solicitor General, urging affirmance for amici curiae states of North Carolina, Utah, Delaware, Florida, Illinois, Kansas, Kentucky, Maryland, Michigan, Mississippi, Missouri, Rhode Island, Tennessee, Virginia, and West Virginia.

Shirley K. Sicilian and Sheldon H. Laskin, urging affirmance for amicus curiae Multistate Tax Commission.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., Marcus W. Trathen, Charles F. Marshall, and Julia C. Ambrose; and Kegler, Brown, Hill & Ritter, L.P.A., and Paul D. Ritter Jr., urging affirmance for amicus curiae National Conference of State Legislatures.

Jones Day, Douglas R. Cole, and Erik J. Clark, urging reversal for amicus curiae Constitutional Law Professors.

Hinman & Carmichael, L.L.P., and John A. Hinman, urging reversal for amicus curiae Specialty Wine Retailers Association.

Mark C. Ellison, urging reversal for amicus curiae National Rural Telecommunications Cooperative.

Chester, Willcox & Saxbe, L.L.P., Gerhardt A. Gosnell II, and Donald C. Brey, urging reversal for amicus curiae Satellite Broadcasting and

Communications Association, ACE Satellite, Buckeye Dish Installation, Inc., Cable Alternatives, Primeview Satellite, Kidwell Satellite, Richland County Satellite, Premiere Satellite & Electronics, Inc., Wells Family Equipment, Thobe TV, Felix Electronics, Vince's TV & Appliance, Digi-Tech Satellite, Dudley Satellites, George's Electronics, Inc., and Progressive Satellite.

DIRECTV vs. MASS. DOR

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO: 10-0324-BLS1

DIRECTV, LLC and DISH NETWORK, L.L.C.

v.

THE COMMONWEALTH OF MASSACHUSETTS,
DEPARTMENT OF REVENUE

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS DIRECTV, LLC AND DISH NETWORK L.L.C.'S MOTION FOR SUMMARY JUDGMENT, DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT, AND DEFENDANT'S MOTION TO STRIKE CERTAIN OF PLAINTIFFS' STATEMENT OF MATERIAL FACTS FOR NONCOMPLIANCE WITH RULE 56(e)

In this action the plaintiffs, DIRECTV, LLC and DISH NETWORK. L.L.C. challenge the constitutionality of G.L. c. 64M, §1 *et seq.*, the so-called "satellite tax," as violating the Commerce Clause of the United States Constitution and the Equal Protection Clauses of the United States and Massachusetts Constitutions. Now before the Court are cross-motions for summary judgment, and the defendant's motion to strike certain statements of material fact. Both sides agree – as, on the record before me, do I – that the issues can be decided as a matter of law.

For the following reasons, the plaintiffs motion for summary judgment is DENIED; the defendant's motion for summary judgment is ALLOWED; and the defendant's motion to strike is DENIED as moot.

BACKGROUND

The record reveals the following facts, which are largely undisputed. Pay television ("pay-TV"), or multi-channel video programming, provides the subscriber with multiple shows, movies,

sporting events, news channels, and more. Massachusetts residents wishing to subscribe to pay-TV typically have two options. They can order their service from a cable provider that assembles its programming packages in Massachusetts and distributes them through a local cable infrastructure ("cable TV").[1] As an alternative, they can order the service through a provider that assembles its programming packages outside Massachusetts and beams its signals directly to subscribers' homes by way of orbiting satellites ("satellite TV").

Plaintiff DIRECTV is a limited liability company headquartered in El Segundo, California. Plaintiff DISH is a limited liability company headquartered in Englewood, California. Both plaintiffs offer pay-TV programming to customers in Massachusetts and throughout the United States via satellite. Satellite TV uses uplink centers to gather, merge, and encrypt television programming signals. DIRECTV's uplink centers are in Cheyenne, Wyoming, and Gilbert, Arizona; DISH's are near Castle Rock, Colorado, and Los Angeles, California. Each uplink center has its own "farm" of satellite dishes, studio equipment, and staff of trained employees. At the uplink centers, content signals are gathered, local advertising is inserted, and the programming packaged.

Satellite TV programming signals are then transmitted from the uplink centers to satellites that reside in geostationary orbit 22,300 miles above the Earth's atmosphere. From these satellites in space, the programming signals are transmitted directly to satellite TV customers, who receive the signals by way of a receiving dish mounted on or located near their homes. To gather local TV signals – that is, those from local broadcast stations such as WBZ or WHDH – the plaintiffs maintain

[1]The major cable providers are Comcast Corporation and Charter Communications, Inc., which are cable television providers, and Verizon Communications Inc. which is a wire-line telephone company. Verizon is not meaningfully different from the cable companies in terms of local assembly and ground-based distribution of Verizon pay-TV service.

local collection facilities in Massachusetts. These local collection facilities typically consist of a single room or closet containing receivers and antennas that gather content from local broadcast stations, and transmit that content via fiber-optic cables leased from telecommunications service providers in Massachusetts to their uplink centers west of the Mississippi. The fiber-optic cables that the plaintiffs lease for this purpose are also used by other persons transmitting data at the same time.

During the time frame at issue in this case, January 1, 2006 through December 31, 2010, DIRECTV had local collection facilities in four Massachusetts cities; DISH had them in three Massachusetts cities. These local collection facilities are maintained by DIRECTV or DISH employees and/or by independent contractors. Because they typically consist of only a small room or closet, they are not staffed on a daily basis.

Both plaintiffs use authorized local retailers to sell their products and services to Massachusetts subscribers. They also sell products and services at the Massachusetts stores of national retailers, such as Best Buy, Sears, BJ's Wholesale Club, and Kmart, with whom they have distribution agreements.[2] From January 1, 2007 through July 1, 2009, DIRECTV contracted with Halstead Communications and Multiband Corporation, each of which has employees in Massachusetts, for installation, maintenance, and/or repair services for those DIRECTV subscribers in Massachusetts. DISH contracted with Prime Service Center, which has employees in Massachusetts, for similar services during the same period.

DISH also used its subsidiary, DISH Network Services, LLC, for installation, maintenance and repair. DISH Network Services had 176 employees in Massachusetts in 2006, 207 in 2007, 188

[2]Each plaintiff had distribution agreements with different retailers.

in 2008, 178 in 2009, and 141 in 2010. From January 1, 2006, through December 31, 2010, DISH Network Services leased facilities in Massachusetts, which it used to store office equipment and vehicles used for installation and repair. For that period, both plaintiffs paid a yearly personal property tax in Massachusetts.

The plaintiffs spend millions of dollars annually on assembly and distribution, largely on satellites located in outer space and at their uplink centers. They also pay for the right to locate their satellites in outer space and transmit their signals through the air using certain frequencies. These fees are paid to the federal government, not to Massachusetts or its local governments.

Cable TV providers, by contrast, use ground-based facilities, thousands of miles of cable, and thousands of Massachusetts-based employees to distribute their programming. All such programming must pass through terrestrial distribution points in Massachusetts called "headend" facilities, typically buildings of between 3000 and 4000 square feet.[3] Large satellite dishes, usually between five and seven feet in diameter and located outside the headend buildings, gather the cable programming signals from the airwaves and transmit them to hundreds of receivers located inside the buildings. Once inside the buildings, these signals are modulated, local advertising is inserted, and the cable programming is assembled into different packages.

Those packages are then distributed to cable TV subscribers through thousands of miles of fiber-optic and/or coaxial cable that is laid in trenches or hung from utility poles.[4] The signals travel

---

[3]In 2010, for example, cable TV providers operated and maintained more than 60 headend facilities in Massachusetts operated by a staff of trained employees. These providers also used contractors to build and install new equipment in the facilities.

[4]In 2011, cable TV providers used more than 30,000 miles of fiber-optic and coaxial wire to distribute programming to Massachusetts customers, and used independent contractors for some aspects of construction.

through "trunk" lines located several feet underground and then distributed through "hubs" and "nodes" into "feeder" lines. Hubs and nodes are physical buildings or cabinet devices that are maintained on a neighborhood-by-neighborhood basis. Ultimately, cable TV signals reach each subscriber's home through a "drop" line running from the feeder line. This network of cables, hubs, nodes, and trunk, feeder, and drop lines are all located, under or above ground, in Massachusetts.

Technologies and physical facilities aside, there is no dispute that both satellite TV and cable TV operate in a similar manner and provide pay-TV service in a similar way. Both offer a variety of programming packages. Both offer local broadcast stations. Both offer basic cable channels, such as CNN, ESPN and C-SPAN. Both offer premium cable channels such as HBO and Showtime. Both offer pay-per-view movies and events. Both offer on-demand programming services. Both offer music channel services. Both secure rights to distribute original programming from content providers. Both advertise their services through the internet, television, direct mail, newspaper circulars, and billboards.

Additionally, both cable TV and satellite TV use call centers to respond to new customers and existing customer inquiries. Both lease equipment to subscribers, such as set-up boxes and digital recording devices. Both use employees and independent contractors for installation, maintenance, and repair. Both pay Massachusetts taxes on their personal property located within the Commonwealth, such as the set-up boxes and DVR devices. They pay corporate income taxes to Massachusetts, and collect and remit sales taxes on qualifying sale-purchase transactions in Massachusetts. Both designate a certain percentage of their channel capacity to public access, educational and government programming. The parties do not dispute that the services are virtually identical, and that customers view them as similar and substitutable. They agree that the typical

Massachusetts customer selects a service based on price, customer service, reception quality, and the breadth and types of programming offered.

The major players on both sides of the controversy are large interstate enterprises: DIRECTV is a corporation chartered in California and headquartered in Segundo; DISH is chartered in Colorado and headquartered in Englewood; Comcast is a Delaware corporation whose principal place of business is in Pennsylvania, and (as of 12/31/09) operated cable systems in 39 states; and Charter Communications is a Delaware corporation, headquartered in Missouri, and operates in 27 states.[5]

The major difference, and for the purposes of these motions the only relevant difference, between satellite TV and cable TV is the method by which the signals are assembled and distributed to customers. The former uses satellites located in outer space; the latter uses headends and an extensive web of ground-based equipment and cables all located in Massachusetts. The parties do not dispute that these different assembly and distribution systems translate into substantially different economic footprints in Massachusetts. From 2006 to 2010, Massachusetts major cable companies spent more than $1.66 billion om capital improvements, $303.3 million in 2010 alone, including investments in headend facilities, cable network, vehicles, and customer equipment. In 2010, major Massachusetts cable companies employed almost 5000 people in the Commonwealth, with a combined payroll of $357 million. The household spending of these employees contributed an additional $274.4 million in economic activity and supported more than 1,800 additional jobs in other industries in Massachusetts.

[5]The parties' stipulation stops here, but it is judicially noticeable that the other major cable companies (Verizon, Cox Communications, Time Warner Cable, and RCN) likewise are headquartered outside of Massachusetts and have substantial regional or national footprints.

The different assembly and distribution systems also translate into different revenue streams for local governments. To place cables under or above ground, and to provide cable services to customers in a particular locality, cable companies must secure permission from local governments, in exchange for which they pay franchise fees to those municipalities in which they operate. The typical franchise fee is 3-5% of gross revenue from sales to subscribers within any given area. In 2010 this resulted in more than $63.3 million in revenue for cities and towns in Massachusetts. In addition to the fees, the typical, non-exclusive, franchise agreement requires that the cable TV provider meet certain obligations, including: meeting service quality and customer service standards; setting aside channels for public, educational, and governmental channels; providing services, facilities, and equipment to localities to support those channels; and providing free service to municipal buildings, schools, and libraries. Massachusetts municipalities also impose an average charge of 1.09% above the franchise fee for the financial support of public, educational, and government programming.

Satellite TV, on the other hand, hires far fewer employees; does not invest billions of dollars to build, service, or maintain facilities in Massachusetts; does not bargain for rights-of-way or pay franchise fees to local governments; and has no obligations to the local municipality similar to those of cable TV. While satellite TV providers still spend millions annually on employment, assembly, and distribution, that money is spent primarily at the providers' uplink centers, all located outside Massachusetts. The plaintiffs do hire independent contractors in Massachusetts to maintain their collection facilities and for installation, maintenance, and repair of their equipment.

The New England Cable & Telecommunications Association ("NECTA") is a regional trade association that represents the interests of substantially all the private cable companies in

Massachusetts. Beginning in 2008, NECTA started lobbying for the imposition of an excise tax on satellite TV providers to achieve tax parity with cable TV companies. NECTA representatives inundated legislators with written materials and in-person meetings, and NECTA's president Paul Cianelli, made statements to the press and the public to the effect that the satellite TV providers enjoyed a special tax exemption. In early June, 2009, NECTA created a website designed to engender support for the tax. Comcast joined NECTA's campaign.

The thrust of NECTA's argument was that cable companies paid franchise fees, while satellite did not, and that cable also paid substantially greater real and personal property taxes to local government than satellite; there was therefore what cable repeatedly called a "tax parity" issue.[6] Some of the communications also mentioned the cable companies had a large real estate footprint and employed thousands locally, see *supra*, whereas the satellite companies had almost no real estate in Massachusetts and far fewer local employees.

On or about January 14, 2009, Senator Michael Morrissey filed Senate Bill 1314, which initially proposed a 5% excise tax on both cable and satellite providers, but allowed cable companies to offset the tax with a credit for property taxes and franchise fees. Cianelli drafted the language for Senate Bill 1314, with the help of NECTA's outside counsel. At a hearing before the Joint Committee on Revenue on April 9, 2009, Cianelli proposed an amendment that would impose the 5% tax only on satellite companies, not on cable companies. A representative from the Satellite Broadcasting and Communications Association testified in opposition. Senate Bill 1314 was never voted out of the Committee.

---

[6]Some of NECTA's lobbying materials refer to the measure as the "Massachusetts Tax Equalization Act." Satellite, meanwhile, was urging legislators to "Support Fair Taxation in the Video Marketplace" by "Reject[ing] Senate Bill 1314." (Jt. App. Ex. 47, 54)

Earlier, in July, 2008, the Legislature had authorized the formation of the Special Committee on Municipal Relief as a joint bipartisan effort of the Senate and the House of Representatives to promote fiscal stability in the Commonwealth. NECTA lobbied members of the Special Committee to recommend the excise tax on their report to the Legislature. The Special Committee held a public hearing on December 3, 2008.

On May 8, 2009, the Special Committee released a report with recommendations, as well as draft legislation, that would impose a 5% excise tax on both cable and satellite TV providers, and allowed a credit for cable TV companies for franchise fees. Lobbyists for NECTA and Comcast then campaigned to change the language of the proposed excise tax so that it applied only to satellite TV providers. On May 21, 2009, the Senate passed an amendment to the House Bill making appropriations for fiscal year 2010 that imposed an excise tax of five percent of gross revenues of satellite TV providers, but not cable TV providers.

Members of the Committee of Conference finalized the details and submitted the appropriations bill, HB 4129, to a vote by the House and Senate. HB4129 included the 5% excise tax on satellite TV. The Legislature passed the bill on June 19, 2009, and Governor Patrick signed the FY 2010 General Appropriation Act, St. 2007, c. 27, into law on June 29, 2009, with the satellite tax as one of many outside sections. See id., §61 ("FY 2010 Appropriations Act"). The tax was

codified as G.L. c. 64M, Taxation of Direct Broadcast Satellite Service.[7] Between August 2, 2009, and November 30, 2010, it generated approximately $16,972,698 in revenue for the Commonwealth.

The plaintiffs filed their Amended Complaint in this case on April 1, 2011, seeking a declaratory judgment to the effect that G.L. c. 64M, §1 *et seq.* violates the Commerce Clause of the United States Constitution (Count I); the Equal Protection Clause of the United States Constitution (Count II); and the Equal Protection Clause of the Massachusetts Constitution (Count II). The gist of their Commerce Clause argument is that the imposition of the tax has a discriminatory effect in that it protects and enhances the Massachusetts economy at the expense of interstate competition. They further argue that the Legislature enacted the excise tax with a discriminatory purpose; that is, to reward cable TV providers for their local economic activities and to penalize satellite TV providers for failing to invest and operate in the Commonwealth. The tax, the plaintiffs contend, confers an unfair advantage on cable companies and a competitive disadvantage on satellite companies, and is excessive in relation to the local benefits bestowed by the cable providers.

With respect to their equal protection claims, the plaintiffs take the position that the satellite-only tax serves no legitimate public purpose and that there is no rational basis for discrimination

---

[7] General Laws c. 64M, § 2, the pertinent statutory provision, is entitled "Excise on direct broadcast satellite service; rate; time of payment" and reads as follows:

> An excise is hereby imposed upon the provision of direct broadcast satellite service to a subscriber or customer by any direct broadcast satellite service provider in an amount equal to 5 per cent of the direct broadcast satellite service provider's gross revenues derived from or attributable to such customer or subscriber. A direct broadcast satellite service provider shall pay the excise to the commissioner at the time provided for filing the return required by section 16 of chapter 62C.

between satellite TV and cable TV. The only purpose of the differential treatment, according to the plaintiffs, is to serve the parochial economic interests of local cable companies and government entities. They seek, in addition to a declaratory judgment, a permanent injunction against the enforcement of the statute and a refund of taxes already paid.

Defendant Department of Revenue ("Department") first responds that there is no violation of the Commerce Clause where satellite TV and cable TV are not similarly situated. In that respect, the Department points out that the two sectors have different technologies, equipment, regulatory responsibilities, and fiscal obligations to local government. That satellite TV and cable TV are not similarly situated, the Department argues, disposes of the plaintiffs' claim of unlawful discrimination against interstate commerce. Furthermore, the Department contends that the plaintiffs' have failed to adduce sufficient evidence that the Legislature purposefully discriminated against satellite TV, where the clear purpose of the act was revenue generation at a time of fiscal constraint, not economic protectionism. As to the plaintiffs equal protection claim, the Department asserts that the tax statute has a fair and rational relationship to the Legislature's efforts to raise state and local revenue. Finally, the Department argues that there can be no refunds absent a request brought before the Appellate Tax Board through the statutory abatement process.

DISCUSSION

Summary judgment is appropriate where, viewing the evidence in the light most favorable to the non-moving party, all material facts have been established and the moving party is entitled to judgment as a matter of law. Cabot Corp. v. AVX Corp., 448 Mass. 629, 636-637 (2007); Mass. R. Civ. P. 56(c). "The moving party must establish that there are no genuine issues of material fact, and that the nonmoving party has no reasonable expectation of proving an essential element of its case."

Miller v. Mooney, 431 Mass. 57, 60 (2000). See also Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989). When parties file cross-motions for summary judgment, the court adopts what has been described as a "Janus-like" dual perspective to view the facts for purposes of each motion through the lens most favorable to the nonmoving party. Allstate Ins. Co. v. Occidental Int'l, Inc., 140 F.3d 1, 2 (1st Cir. 1998). Each of the moving parties bears the burden of affirmatively demonstrating the absence of a triable issue as to its respective claim. Lev v. Beverly Enterprises-Massachusetts, Inc., 457 Mass. 234, 237 (2010).

1. The Commerce Clause.

Article 1, §8, cl. 3 of the United States Constitution expressly authorizes Congress to regulate commerce among the states. The Commerce Clause is more than an affirmative grant of power, however; it also has a "negative sweep," known as the "dormant" or "negative" Commerce Clause, by which "[a] State is ... precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States."[8] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278 n.7 (1977).

"The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." West Lynn Creamery v. Healy, 512 U.S. 186, 193 (1997). The dormant Commerce Clause sweeps more broadly than this, however, and generally

> prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors .... Thus, state statutes that clearly

[8]This construction is not universally embraced, even in high places, but it is the law of the land. See General Motors Corp. v. Tracy, 519 U.S. 278, 312-13 (1997) (Scalia, J., concurring) and cases cited.

> discriminate against interstate commerce are routinely struck down ... unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.

Id. at 192 (invalidating order by Massachusetts Department of Agriculture imposing monetary assessment on fluid milk, two-thirds of which was produced out of state, and distributing the proceeds to Massachusetts dairy farmers).

A dormant commerce clause challenge requires "a sensitive, case-by-case analysis of the purposes and effects" of a regulatory measure "'to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.'" Id. at 201 (citation omitted). Discrimination "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Oregon Waste Sys. v. Department of Envtl. Quality, 511 U.S. 93, 99 (1994) (striking down surcharge for disposal of solid waste generated out of state).

A statute may discriminate against out-of-state interests in any of three ways: (1) it may be discriminatory on its face; (2) it may have a discriminatory effect; or (3) it may have a discriminatory intent.[9] See Amerada Hess Corp. v. Director, Division of Taxation, New Jersey Dep't of the Treasury, 490 U.S. 66, 75 (1989). The burden of establishing unlawful discrimination is upon the party challenging the validity of the statute. Lenscrafters, Inc. v. Robinson, 403 F.3d 798, 803 (6th Cir. 2005). A law that discriminates in favor of in-state business and against its out-of-state, but otherwise similarly situated, competition is "virtually per se invalid," and will survive only if it "advances a legitimate local purpose that cannot be adequately served by reasonable

---

[9] The plaintiff do not argue that the satellite tax statute is discriminatory on its face, and the Court agrees.

nondiscriminatory alternatives." Kentucky Dept. of Rev. v. Davis, 553 U.S. 328, 338 (2008) (upholding state income tax exemption for interest earned municipal bonds of in-state, but not out-of-state, issuers). "Absent discrimination for the forbidden purpose, however, 'the law will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" Id. at 338-339 (citation omitted).

The purpose of the commerce clause is not to relieve those engaged in interstate commerce from their just share of the state tax burden, even though it increases the cost of doing business. See, e.g., Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938). Nor are states prohibited from "structuring their tax systems" in a nondiscriminatory manner "to encourage the growth and development of intrastate commerce and industry." Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 336-337 (1977) (sustaining challenge to New York law imposing a greater tax burden on out-of-state securities sales than sales conducted within New York); see also West Lynn Creamery, 512 U.S. at 199 n.15 ("it is undisputed that States may try to attract business by creating an environment conducive to economic activity").

In this case, the satellite providers maintain that the Satellite Service Tax discriminates against interstate commerce in both effect and purpose.

A. Discriminatory Effect.

"Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." General Motors Corp. v. Tracy, 519 U.S. 278, 299 (1997) ("Tracy"). The threshold question in making a determination as to discrimination, therefore, is "whether the companies are indeed similarly situated for constitutional purposes." Id.; see Lenscrafters, 403 F.3d at 804. The plaintiffs argue that, because they operate in the same market as cable TV providers, and

are thus competitors, they are similarly situated for constitutional purposes. The Department argues that because satellite and cable have different structures, methods of operation, and regulatory obligations, they are not similarly situated. The Department has the better of the argument.

Tracy was a challenge to the application of Ohio's general sales and use tax to interstate natural gas transmission companies, where local distribution companies ("LDCs") were exempt. The court observed that LDCs were heavily regulated territorial monopolies, burdened by "a typical blend of limitation and affirmative obligation." Each LDC was required to submit annual forecasts of supply and demand; to "comply with a range of accounting, reporting and disclosure rules"; to obtain PUC permission before it could issue securities or enter into certain contracts; to submit to detailed regulation of rates, termination of service, and backup supply; and to serve all members of the public in its geographic territory without discrimination. 519 U.S. at 295-97.

> The fact that the local utilities continue to provide a product consisting of gas bundled with the services and protections summarized above, a product thus different from the marketers' unbundled gas, raises a hurdle for GMC's[10] claim that Ohio's differential tax treatment of natural gas utilities and independent marketers violates our "virtually *per se* rule of invalidity" prohibiting facial discrimination against interstate commerce.

Id. at 297-98. That the two business models competed, to a degree, for the same customers did not mean that the state could not differentially tax their products. To the contrary, the court saw this as reason for concern that equating the highly regulated LDCs, for tax purposes, with the comparatively unregulated interstate marketers could "affect[] the overall size of the JDCs' customer base," thereby degrading their ability "to serve the captive market where there is no such competition." Id. at 307.

---

[10]General Motors Corporation, a large industrial consumer of natural gas for its manufacturing plants in Ohio, purchased nearly all of it directly from independent out-of-state marketers. 519 U.S. at 285.

The plaintiffs rely in large part on Bacchus Imports, LTD v. Dias, 468 U.S. 263 (1984); Family Winemakers of California v. Jenkins, 592 F.3d 1 (1st Cir. 2010); and Island Silver & Spice, Inc. v. Islamorada, 542 F.3d 844 (11th Cir. 2008) to support their contention that cable TV and satellite TV are similarly situated and so must be identically taxed. In all three of these cases, however, the courts concluded that the discriminatory statute or regulation was based entirely on protectionist distinctions between in-state and interstate businesses. See Amerada Hess, 490 U.S. at 77 and discussion, *infra*.

In Bacchus, the United States Supreme Court held the Hawaii excise tax on liquor because it exempted okelehao and fruit wines. "Okelehao is a brandy distilled from the root of the ti plant, an indigenous shrub of Hawaii," and pineapple wine was also manufactured locally. 468 U.S. at 265. There was clear legislative history demonstrating that the reason for the tax exemptions was "'to encourage and support the establishment of a new industry" within Hawaii. Id. at 271. The tax exemption was thus discriminatory in both purpose and effect.

Similarly, in Family Winemakers, the First Circuit struck down as discriminatory a Massachusetts statute that allowed only "small" wineries to obtain a license that allowed them to ship wine in three ways: directly to consumers, through wholesalers, or through retail distribution. 592 F.3d at 4. "Large" wineries, by contrast, had to choose between applying for a license that allows them to distribute their product directly to consumers, or distribute wine exclusively through wholesalers; they could not do both. Id. All wineries in Massachusetts are "small," in that they produce less than 30,000 gallons of grape wine annually[11]; there are no "large" wineries in

[11]There was legislative history suggesting that the exemption for non-grape fruit wine was inserted to prevent a particular Massachusetts winery from exceeding the 30,000 gallon limit.

Massachusetts. Id. The Court held that the gallonage cap changed the competitive balance so as to benefit significantly the Massachusetts wineries and burden significantly the out-of-state wineries, and that "[t]he advantages afforded to 'small' wineries bear little relation to the market challenges caused by the relative sizes of the wineries." Id. at 5. Added to this, as in Bacchus, was compelling evidence of a protectionist purpose.[12] This made the law "'virtually per se invalid,' salvageable only upon a showing that "'it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" Id. at 18-19, quoting Kentucky Department of Revenue v. Davis, 128 S. Ct. at 1808.

In Island Silver, a town ordinance restricted so-called "formula" retailers (large retail chains) to a certain square footage and frontage, limited so as to be incompatible with the large area that these nationally branded retailers require. 542 F.3d at 846. The effect was to prevent the plaintiff, a local mixed use retailer, from selling its real estate to a developer planning to establish a Walgreen's drugstore on the same footprint. Id. at 845. The Eleventh Circuit held that the provision was subject to heightened scrutiny because it effectively eliminated all new interstate retailers. Id. at 846-847. Although the purported purpose of the law – preserving a small town character – was deemed "legitimate" in theory, the number of existing chain stores and dearth of historic structures in the vicinity of Island Silver's property supported the district court's finding that "[Islamorada] has

[12]The statute replaced an earlier vision which explicitly made the combined-distribution license available only to in-state wineries, and had recently been ruled unconstitutional. The sponsor of the new legislation explained to the General Court that "'with the limitations that we are suggesting in the legislation, we are really still giving an inherent advantage indirectly to the local wineries.'" 592 F.3d at 12-13. See also the preceding footnote.

not demonstrated that it has any small town character to preserve," and thus had "failed to provide a legitimate local purpose to justify the ordinance's discriminatory effects." 542 F.3d at 847-48.[13]

All three of these cases – none of which involved explicit, or even very precise, discrimination between intra- and interstate commerce – might fairly be regarded as close, were it not for the clarity of the legislative history. The present case is different, however, in a more fundamental respect. The dormant Commerce Clause protects the interstate *market*, not particular interstate firms, or even particular structures or methods of operation within a market. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127-28 (1978). Differential tax treatment of different modes of operation is not unconstitutional, where the "different effect ... on these two categories of companies results solely on the nature of their businesses, not from the location of their activities." Amerada Hess, 490 U.S. at 78 (holding that state tax code denying deduction for federal windfall profit tax on crude oil did not unconstitutionally favor local, independent retailers over large interstate oil companies).

It should come as no surprise, therefore, that every court to have considered the issue so far has concluded that the Commerce Clause does not prohibit differential taxation of providers that deliver programming by satellite as opposed to cable. See, e.g., DIRECTV, Inc. v. Treesh, 487 F.3d 471, 480 (6th Cir. 2007) ("Treesh"), *cert. denied*, 552 U.S. 1311 (2008); DIRECTV, Inc. v. North Carolina, 178 N.C. App. 659, 667 (2006) ("North Carolina"); DIRECTV, Inc. v. Levin, 128 Ohio St. 3d 68, 74 (2010), *cert. denied*, __ S. Ct. __ (6/25/12) ("Levin"); DIRECTV, Inc. v. Tolson, 498

[13]Other stated justifications – encouragement of small scale and water-oriented uses, preservation of the natural environment, and avoidance of increased traffic congestion, litter, garbage and rubbish – were also rejected as inaptly served by the ordinance. The court was polite enough not to observe that what the ordinance *did* serve tolerably well was the interests of the local business community.

F. Supp. 2d 784, 800 (E.D.N.C. 2007) (dismissing the satellite companies' complaint on other grounds but citing with approval Treesh and North Carolina).

All four of these cases involved sales taxes, though they examined two distinct systems. In North Carolina and Levin, North Carolina and Ohio had imposed a straightforward sales tax on satellite providers but not on cable providers. By the time of the Tolson decision, however, the North Carolina legislature had overhauled the tax code so that both cable and satellite companies paid sales tax at the same rate, but cable providers were relieved of paying franchise taxes to the municipalities in which they operated; instead, the state distributed sales tax revenues from cable and satellite providers to local governments, some of which had previously received franchise revenues. The new North Carolina law was very similar to the Kentucky system earlier upheld in Treesh.

All four courts rejected the satellite companies' challenges, reasoning that the dormant Commerce Clause protects the interstate market for a particular product, but not the particular structure or method of operation in a retail market. Treesh, 487 F.3d at 480. Accord Levin, 128 Ohio St. 3d at 75; North Carolina, 178 N.C. App. at 667-668. These courts have simply applied, to the pay TV industry, the holdings in Amerada Hess and Exxon that there is no violation of the Commerce Clause when differential tax treatment has nothing to do with the geographical location of the companies or their economic activities, and everything to do with the manner by which they distribute programming. See, e.g., DIRECTV v. Treesh, 469 F. Supp. 2d 425, 439 (E.D. Ken. 2006), *aff'd*, 487 F.3d 471, 480 (6th Cir. 2007). Although under the Exxon rule, the dormant Commerce Clause would prohibit discrimination against the interstate market for multichannel video programming, it does not prohibit a differentiation between programmers in that interstate market who deliver programming by satellite and those who deliver by cable. Id. at 440.

In the present case as in those, there can be no suspicion that the tax in question was intended to protect local pay-TV providers from out of state competition; all of the competitors – satellite and cable – are large out-of-state companies with regional or national footprints. Moreover, although the satellite and cable companies offer much the same programming and thus compete for many of the same customers,[14] they go about it with different modes of operation, using very different physical infrastructures, and operating in markedly different regulatory environments, much as in Tracy. It follows that satellite TV and cable TV are not similarly situated for Commerce Clause purposes, and that the satellite tax does not discriminate against the satellite providers based on geography.

B. Discriminatory Purpose.

The fact that cable and satellite providers are not similarly situated effectively sidelines any concern over the purpose behind their differential tax treatment. Nonetheless, the plaintiffs argue that the Legislature enacted the satellite-only tax with the intent to favor the local economy, thus purposefully discriminating against out-of-state interests in violation of the Commerce Clause. See, e.g., Amerada Hess, 490 U.S. at 75. The evidence they have provided of protectionist legislative intent, however, is singularly unconvincing.

The centerpiece of the plaintiffs' argument on discriminatory intent consists of multiple communications from NECTA, its lobbyist, and Comcast to members of the Legislature. Some of

---

[14]Cable providers, of course, are limited to the cities and towns that have granted them franchises. Satellite providers can reach all of these customers, and also those who live far beyond the reach of cable. In any event, "[a]lthough competing in different markets or offering different products generally means that entities are not similarly situated, see Tracy, 519 U.S. at 299, competing in the same market is not sufficient to conclude that entities are similarly situated, as Tracy made clear." National Ass'n of Optometrists v. Brown, 567 F.3d 521, 527 (9th Cir. 2009).

the Housing Court Dep't v. Commissioner of Admin., 391 Mass. 198, 205 (1984); *accord*, Finch v. Commonwealth Health Ins. Connector Auth., 461 Mass. 232, 240 n.6 (2012); Boston Water & Sewer Comm'n v. Metropolitan Dist. Comm'n., 408 Mass 572, 578 (1990).

Finally, the plaintiffs see evidence of discriminatory intent in what they call a "backdoor" process and the Legislature calls "outside sections." Although this device has been the subject of periodic criticism from individual legislators, the other branches of government, and the citizenry, the Supreme Judicial Court has been

> reluctant to reject the use of "outside sections" as a means to enact amendments to general legislation. "This court traditionally has avoided involvement in the internal workings of the Legislature in deference to the unique role of the Legislature and its expertise with regard to internal legislative processes." "In these circumstances, mindful of the principle of separation of powers so carefully stated in art. 30 of the Declaration of Rights, this court should not infer specific constitutional procedures that the ... legislative branch[] ... must follow."

First Justice of Bristol Div. of the Juvenile Court Dept. v. Clerk-Magistrate of Bristol Div. of the Bristol Juvenile Court Dept., 438 Mass. 387, 408 (2003) (citations omitted). Outside section or no, the proposed measure was no secret from the satellite industry (which lobbied against it) or, apparently, from its customers. (Jt. App. Ex. 54, 84) Finally, the plaintiffs make no connection between the use of the outside section process and any supposed intent to discriminate against interstate commerce.

In short: the plaintiffs have not shown that the satellite tax had any purpose beyond the obvious: raising revenue, by taxing an industry sector that was rationally viewed as undertaxed. Accordingly, where cable and satellite are not similarly situated, and where there is no evidence of discriminatory effect or purpose, the plaintiffs' claim of a commerce clause violation fails.

2. **Violation of the Equal Protection Clause**

The plaintiffs additionally argue that the imposition of satellite tax violates the Equal Protection Clauses of the Constitutions of the United States (Am. XIV) and Massachusetts (Arts. I, X) because it arbitrarily distinguishes between similarly situated businesses without any rational basis related to a legitimate state policy. The analysis is the same under both constitutions. Brackett v. Civil Service Comm'n, 447 Mass. 233, 243 (2006). Absent a suspect classification or a fundamental right (neither of which is present here), however, there is no equal protection violation if the statutory distinction in question has a rational basis. Armour v. City of Indianapolis, __ U.S. __, 132 S. Ct. 2073, 2080 (2012); Finch at 668-69.

"'[C]reating classifications and distinctions in tax statutes'" is a domain in which "'[l]egislatures have especially broad latitude." Armour at 2080, quoting Regan v. Taxation With Representation of Washington, 461 U. S. 540, 547 (1983). "So long as any basis of fact can be reasonably conceived showing that the distinction made by a tax statute has a fair and rational relationship to the object sought to be accomplished, the legislative classification is not violative of equal protection principles." Seiler Corp. v. Commissioner of Revenue, 384 Mass. 635, 639 (1981).

The enactment of the satellite tax came at a time when Massachusetts was in the throes of a fiscal crisis. The Legislature was faced with a looming revenue shortfall, and it chose, as a small part of the solution, to tax a sector whose existing regulatory and fiscal obligations to the sovereign were reasonably perceived as modest when compared to those of the rest of the pay-TV industry. This was a plausible and entirely legitimate reason for the tax classification. "[T]he legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated

as to render the distinction arbitrary or irrational." Armour, *supra*. The plaintiffs' claim of a violation of the equal protection clauses of both the United States Constitution and the Massachusetts Constitution therefore fails.

ORDER FOR JUDGMENT

For the forgoing reasons, plaintiffs DIRECTV, L.L.C. and DISH NETWORK, LLC's Motion for Summary Judgment is DENIED. Defendant Commonwealth of Massachusetts, Department of Revenue's Motion for Summary Judgment is ALLOWED.

Judgment shall enter, declaring that Chapter 64M of the General Laws is lawful under Article 1, §8, cl. 3 of the United States Constitution (the commerce clause) and under the equal protection clauses of the of the Fourteenth Amendment to the United States Constitution and Articles I and X of the Massachusetts Constitution.

Thomas P. Billings, Associate Justice

Dated: November 21, 2012